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Held at Headquarters, New York, on Wednesday, 9 May 2018, at 10 a.m.

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Present:

Chair: Mr. Valencia-Ospina

Members: Mr. Argüello Gómez
Mr. Aurescu
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guilloff
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Vázquez-Bermúdez
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

Statement by the Under-Secretary-General for Legal Affairs, the Legal Counsel

The Chair welcomed Mr. de Serpa Soares, Under-Secretary-General for Legal Affairs, the Legal Counsel, and invited him to take the floor.

Mr. de Serpa Soares (Under-Secretary-General for Legal Affairs, the Legal Counsel), welcoming the members of the International Law Commission to United Nations Headquarters, said that it was a very special occasion, not only because the last time the Commission had been in New York dated back to 1998, but also because the current year marked its seventieth anniversary. Throughout its 70 years, it had worked closely with the Sixth Committee of the General Assembly in advancing both the scope and the substance of the international legal system. It had done so through the progressive development and codification of international law, marked by ups and downs, triumphs and tribulations. In the next few months, it would take time to reflect on its achievements, consider its challenges and look ahead to its future.

His statement at the current meeting of the Commission, which he was addressing for the fifth time, was a continuation of the tradition of providing its members with the overview of the previous year's activities of the Office of Legal Affairs and of the ways in which the various units of that Office had played their part in developing and upholding international law.

In the Office of the Legal Counsel, there had been significant developments in four areas. First, in the area of accountability for international crimes, the formal closure in December 2017 of the International Criminal Tribunal for the Former Yugoslavia had marked the end of an era ushered in by the Tribunal as the very first international criminal tribunal of modern times. A measure of its success was the fact that, over its 24 years of work, each of its 161 accused persons had been accounted for. The remainder of its work and that of the International Criminal Tribunal for Rwanda was being discharged by the International Residual Mechanism for International Tribunals. The Mechanism had recently rendered an important judgment in one of the Tribunal for the Former Yugoslavia, convicting Mr. Vojislav Šešelj of crimes against humanity and bringing those long-running proceedings to an end. It had also held appeal hearings in the case of *Radovan Karadžić*, projected for conclusion by the year's end. The Mechanism was seized with one other appeal, in the case of *Ratko Mladić*, and a retrial in the case of *Stanišić* and *Simatović*. The conclusion of all the substantive cases of

both the Rwanda and the Former Yugoslavia tribunals was thus clearly in sight.

Other tribunals were also reaching defining stages of their work. At the Special Tribunal for Lebanon, closing arguments in the central case of *Ayyash et al.* had been set for June and early July, with judgment to follow in due course. At the Extraordinary Chambers in the Courts of Cambodia, judgment in the second trial of the two highest-level Khmer Rouge officials, including charges of genocide, was expected later in the year, thus bringing those proceedings to an end. Lengthy judicial investigations with respect to a further four accused persons had either concluded or were nearing completion. However, both the Khmer Rouge Tribunal and the Residual Special Court for Sierra Leone continued to suffer from a lack of donor willingness to cover their budgetary needs, such that once again the General Assembly had been required to approve subventions to allow them to continue to operate. The processes for seeking subventions and voluntary financial contributions were time- and cost-intensive and diverted tribunals and their officials from their core functions.

While the General Assembly had applied the same funding model of voluntary contributions to the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, it had shown a willingness to reconsider that funding basis and he was hopeful that the membership would take the lessons of the past into account in setting that Mechanism on a sustainable financial path. The Mechanism represented a significant new approach to accountability for international crimes, focused on supporting the prosecution efforts of other stakeholders rather than conducting its own prosecutions. There was considerable interest in how it would discharge those functions in the Syrian context, given the persistent lack of agreement in the Security Council on other avenues, such as referral to the International Criminal Court and extension of the mandate of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism. Following the appointment of its leadership team — a process in which his Office had been closely involved — the Mechanism was well placed to perform its vital work.

He welcomed the unity demonstrated by the Security Council in unanimously adopting a similar approach in the case of Iraq, for which it had, by its resolution [2379 \(2017\)](#), requested the Secretary-General to establish an independent investigative team to support domestic efforts to hold Islamic State in Iraq and

the Levant accountable for its actions in Iraq. His Office had been working closely with the Government of Iraq and other key stakeholders towards the prompt operationalization of that team. He expected its head to be appointed soon but continued to have concerns about the project and how it would develop in the future.

His Office had also been involved in other key justice processes in other national jurisdictions, notably the Central African Republic, where the Special Criminal Court was developing its activities, and Colombia, where magistrates had been designated for the Special Jurisdiction for Peace, which had begun its work. His Office had worked closely with the African Union Commission in support of efforts to establish the Hybrid Court for South Sudan, in particular by providing technical assistance on the legal instruments for its establishment and operation. He echoed the calls for the Government, following approval of the legal instruments by the Cabinet of South Sudan in December 2017, to take prompt steps to sign the memorandum of understanding with the African Union to establish the Hybrid Court.

A second area of significant development was peacekeeping, where completion of the tasks mandated by the Security Council in support of peace, security and the rule of law in Côte d'Ivoire, Haiti and Liberia had been reflected in the closure of the three related peacekeeping operations. The United Nations Operation in Côte d'Ivoire (ONUCI) had closed in June 2017, after 13 years; the United Nations Stabilization Mission in Haiti (MINUSTAH) a few months later, in October 2017, after 13 years; and the United Nations Mission in Liberia (UNMIL) in March 2018, after 14 years. While, in Haiti, the Security Council had set up a smaller peace operation (the Mission for Justice Support in Haiti, or MINUJUSTH) to replace MINUSTAH, Côte d'Ivoire and Liberia had each completed their transition from peacekeeping to peacebuilding. The new operation in Haiti no longer had a military component, but it had retained former police units authorized to provide operational support to the national police; it had a two-year mandate following a request from the Security Council to the Secretary-General for a two-year exit strategy to a United Nations presence in that country that would be dedicated to peacebuilding exclusively.

The closing of peace operations was a complex process for which his Office provided support. In the previous year, it had facilitated the handover of the ONUCI and UNMIL radio stations and the related equipment to the Government of Côte d'Ivoire and the Economic Community of West African States, respectively, and had ensured, through agreements negotiated with those partners, that the assets would be

used to further the objectives of peace and development. The Secretariat had drawn lessons in terms of the required exit strategy for its peacekeeping operations from the gradual handover of the responsibilities of UNMIL, which had taken three years.

His Office also played a part at the beginning of peacekeeping operations, its immediate role being to facilitate the conclusion of a status-of-forces agreement with the host country, following the long-established practice of the Secretariat in the field of peacekeeping. Such agreements continued to be crucial tools in ensuring that a peacekeeping mission and their members enjoyed the privileges, immunities, rights and facilities needed for the proper implementation of the mission's mandate. Since the resolution establishing MINUJUSTH had not included any provision for a status-of-forces agreement, it had been all the more urgent to sign one for that new operation. Initially, and on the model of what had been done in Burundi, the idea had been to apply the MINUSTAH agreement *mutatis mutandis* to MINUJUSTH. The Government of Haiti had preferred, however, to negotiate a new agreement. His Office had facilitated those negotiations, which had led to the signing of the new status agreement in October 2017. One aspect of that agreement that might be of interest, in view of one of the topics currently before the Commission, was that it was being applied provisionally and would enter into force upon notification by the Government of the completion of its internal procedures.

In the past year, his Office had also been closely involved in supporting the competent departments in the implementation of a number of Security Council resolutions on the situation in Mali. Following the establishment by Mali, Burkina Faso, Niger, Chad and Mauritania, in early 2017, of a joint force to fight terrorist groups and transnational organized crime networks in their shared border areas (the FC-G5S), which had been welcomed by the Security Council, his Office had provided advice on the relationship between that new entity and the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). The increasingly complex and dangerous situation in the centre and north of Mali had at the same time required that MINUSMA should reconsider its posture, which the Council had repeatedly requested to be more robust and proactive.

The advice of his Office had remained, as in the case of the French forces and the Malian armed forces, that MINUSMA should maintain a level of operational coordination with the other military and security actors in its area of operations, while also bearing in mind that its own mandate did not include an offensive counterterrorist element. It remained, however,

authorized to use force in self-defence and in defence of its mandate, which included the protection of civilians and stabilization by preventing the return of armed elements to populated areas. That mandate had again evolved following Security Council resolution [2391 \(2017\)](#), which had assigned to MINUSMA the task of providing “specified operational and logistical support” to the Joint Force of the Group of Five for the Sahel (G5 Sahel), based on a financial mechanism coordinated by the European Union.

His Office had thus facilitated the negotiation of a set of agreements, including a tripartite technical arrangement with the G5 Sahel and the European Commission, on the financing of United Nations support to the Joint Force. That support was limited to the territory of Mali, reflecting the geographical scope of the Mission’s mandate, and consisted mainly in medical evacuations for the Joint Force, the construction or improvement of its camps and basic supplies such as water and fuel; it did not, however, extend to the provision of lethal equipment. Moreover, such support remained subject to United Nations Human Rights Due Diligence Policy. If concerns arose over compliance of the Joint Force with human rights, international humanitarian law or refugee law, MINUSMA support to the Joint Force could be unilaterally suspended and discontinued. The technical arrangement with the G5 Sahel, signed on 23 February 2017 in Brussels, also reflected the fact that United Nations human rights activities in relation to the Joint Force were not limited to Mali, unlike the logistical support to be provided by MINUSMA; it extended to the FC-G5S units in the territory of the other G5 Sahel States.

The third area where there had been significant developments was that of the peaceful resolution of disputes, particularly through the International Court of Justice, with which his Office had been involved in various ways.

By its resolution [71/292](#), adopted in June 2017, the General Assembly had requested an advisory opinion from the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, with specific reference to the complex questions of the lawful completion of the process of decolonization of Mauritius at the time of independence and the consequences under international law arising from the continued administration by the United Kingdom of the Chagos Archipelago. His Office had prepared and supplied to the Court a dossier containing all relevant documents and he would be following the evolution of the proceedings with interest.

A controversy had arisen between Guyana and Venezuela as a result of the contention by Venezuela that the arbitral award of 1899 concerning the frontier between British Guiana and Venezuela was null and void. Under the agreement to resolve the controversy over the frontier between Venezuela and British Guiana signed at Geneva on 17 February 1966 (Geneva Agreement), the parties had conferred on the Secretary-General the power and responsibility to choose a means of peaceful settlement from amongst those contemplated in Article 33 of the Charter of the United Nations and, if no solution was thereby to be found, to choose another means of settlement. Efforts by the Secretary-General, starting in 1989, to lend his good offices with a view to resolving the controversy having proved unsuccessful, he had communicated to the parties a framework for the resolution of the controversy and had extended the good offices process for a further year, on the understanding that if, by the end of 2017, the Secretary-General concluded that significant progress had not been made, the International Court of Justice would be chosen as the next means of settlement, unless that was contrary to the joint wishes of the two Governments.

In January 2018, the Secretary-General, having concluded that the necessary progress had not been made, chose the International Court of Justice as the means to be used to solve the controversy, while also reaching the conclusion that Guyana and Venezuela could benefit from the continued good offices of the United Nations established on the basis of the powers of the Secretary-General under the Charter. Those good offices could contribute to the use of the International Court of Justice as the new means of settlement; help the parties to reach an out-of-court settlement; and help them to address other issues in their bilateral relations. In March 2018, Guyana had filed an application with the Court for it to confirm the legal validity and binding effect of the 1899 arbitral award, founding the Court’s jurisdiction on the combined effect of the 1966 Geneva Agreement and the Secretary-General’s decision of January 2018 as the means to be used for the resolution of the controversy. He hoped that those steps would move the parties toward a resolution of the dispute.

On the subject of the International Court of Justice, he noted that, in November 2017, the General Assembly and the Security Council had held an election, as they did every three years, to elect five judges of the Court. There had been six candidates for the five vacant seats and the election had been a prolonged one; in particular, it had taken a long time to complete the election of the fifth judge.

Turning, lastly, to his Office’s work in the area of the status, privileges and immunities of the

Organization, he said that there had continued to be no improvement in the situation. Challenges remained in respect of taxation, social security and the validity of existing bilateral agreements, especially in South America. The Secretariat had also had to deal with difficult matters relating to the interpretation of the Headquarters Agreement with the United States concerning the issuance of visas, geographical restrictions and the status of the premises of permanent missions to the United Nations and their personnel.

Reporting on the activities of the International Trade Law Division and the United Nations Commission on International Trade Law, he said that, following the adoption of the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration, Working Group III of the Commission had commenced wide-ranging work on possible reform of investor-State dispute settlement. It had begun to identify and consider the main concerns raised in that area, whose importance was reflected in the Working Group's position that a factual analysis should also be supplemented by a review of the opinions expressed on the subject, which were equally relevant for States taking general policy decisions. After drawing conclusions from that analysis, the Working Group would decide whether such a reform was desirable and, if so, what solutions might be adopted to meet the main concerns.

Working Group IV (electronic commerce) had commenced its work on the legal aspects of identity management and trust services, widely recognized to be of fundamental importance for the use of information and communications technologies in a digital economy. In particular, the cross-border legal recognition of identity management and trust services raised serious difficulties but also offered significant advantages. For example, the facilitation of paperless trade, which could lead to a considerable reduction in commercial costs, made it necessary for all the entities involved to be reliably identified and for the origin and integrity of the messages exchanged to be assured. The Commission was studying various options for its work in that area, taking into account existing laws and the general principles underpinning its texts on electronic commerce.

In the field of international mediation, which was a relatively inexpensive method of dispute settlement characterized by flexibility and rapidity and serving to protect long-term relations between the parties, the Commission was moving towards the finalization and adoption of new instruments. It had placed on its agenda the finalization of the draft convention on international settlement agreements resulting from mediation, which would subsequently be submitted for adoption to the General Assembly. Once adopted and in force, it would

serve as a legal frame of reference for the implementation of international settlement agreements. To complement the draft convention, the Commission was also planning to adopt a supplement to the Model Law on International Commercial Conciliation, which would also deal with the implementation of international settlement agreements.

Turning to the activities of the Division for Ocean Affairs and the Law of the Sea he referred to the of the major ongoing process at the United Nations concerning the development of an internationally legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The Preparatory Committee established in that connection by the General Assembly had adopted, at its fourth session, in July 2017, its recommendations to the General Assembly, which had, on that basis, decided to convene an intergovernmental conference, under the auspices of the United Nations, with a view to developing the instrument as soon as possible. The conference would meet in four sessions, the first of which would take place in September 2018. The negotiations would address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology. A number of cross-cutting issues would also be considered.

A second intergovernmental process guided by international law, including the aforementioned Convention and other applicable international instruments, was the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects. The Process was currently in its second cycle, which had begun in 2017 and would be completed in 2020. The two main outputs for the second cycle were the preparation of a second world ocean assessment and the Regular Process support for other ocean-related intergovernmental processes, including the preparation of three process-specific technical abstracts.

The Chair thanked the Legal Counsel for his statement as well as for the support the Commission received from the Office of Legal Affairs, particularly the Codification Division, not only in substantive matters but also in the organization of the current part of the Commission's session in New York. He invited members to put questions to the Legal Counsel.

Mr. Vázquez-Bermúdez expressed his gratitude for the substantive support that the Commission received from the Codification Division, one notable example of which was the recent memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710). That study, an update of the survey carried out in 1949, would be of great assistance to those called upon to identify customary standards in specific cases, but also within the topic of identification of customary international law. The Commission recognized the crucial role of States in expressing and establishing such standards through general practice, as well as that of international organizations as subjects of international law, but also as entities having their own legal personality. He wished to know the Legal Counsel's view of the contribution of their practice to another element of customary law, namely, *opinio juris*, as expressed through their own legal decisions and the opinions of their legal advisers.

Mr. de Serpa Soares (Under-Secretary-General for Legal Affairs, the Legal Counsel) referred to the 1948 study by one of his predecessors at the United Nations, Oscar Schachter, on the development of international law of the United Nations Secretariat, written in the early days of the Organization at a time of global optimism about its role. He was more modest in his assessment.

Currently, some 95 per cent of the work of his Office was informal: formal legal opinions were the exception. Some of those opinions were published, but the most interesting ones, for example on interpretation of the Charter or the use of force, were not publishable. When his Office provided legal advice to colleagues or to the Secretary-General, confidentiality had to be preserved. The dilemma he consequently faced was between publishing the most interesting material, which was not possible, or publishing the least interesting material, which was possible. His Office did, however, through those opinions, make a contribution in specific areas of international law, mostly in respect of the life of international organizations, especially their rules of procedure and privileges and immunities. Its opinions on those subjects were based on many years of practice and were recognized to carry legal authority. He could nevertheless cite a case where the Legal Counsel's interpretation of procedures had been overturned by the General Assembly. An effort was being made to publish more systematically certain types of legal opinions but there were limitations, which were inherent in the work of his Office.

Mr. Rajput said that the practice of having the Legal Counsel present his work to the Commission was

valuable, as it put the Commission's work in context and helped members to understand how the various components of the United Nations legal system worked. He noted that the United Nations Secretariat played a vital role in the functioning of the Commission.

He asked what the consequences of the Amendments to the Rome Statute of the International Criminal Court on the crime of aggression (Kampala Amendments) would be with regard to actions authorized by the Security Council. In particular, he wished to know what would happen if the Amendments were used against Member States for exceeding the authorization under the Security Council resolutions. He also inquired about the potential of the conciliation mechanism provided for under the United Nations Convention on the Law of the Sea, which seemed to be underutilized. Lastly, he asked whether there was any possibility that the Commission on the Limits of the Continental Shelf, which performed a very important function, would receive appropriate resources.

Mr. Murphy said that the presentation by the Legal Counsel was always a highlight of the Commission's sessions. The Office of Legal Affairs provided memorandums of an exceptionally high standard on many topics on the Commission's programme of work and had provided extraordinary support throughout the complicated process of arranging the Commission's session in New York. He also commended the regional courses in international law organized by the Codification Division. The most recent course, held in Santiago from 23 April to 18 May 2018, had been of great benefit to what Oscar Schachter had termed the "invisible college of international lawyers".

The Sixth Committee had responded reasonably favourably to the placement of the topic "The settlement of international disputes to which international organizations are parties" on the Commission's long-term programme work. He asked whether the Legal Counsel would see value in moving that topic to the current programme of work, so that the Commission could examine past practice and attempt to develop a relevant set of guidelines or conclusions. He also asked whether it would be useful for the Commission to include under that topic disputes of a private character that involved allegations of tortious conduct, such as the allegations that had been made against the United Nations in relation to the cholera outbreak in Haiti.

Mr. de Serpa Soares (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that the scope of the Kampala Amendments was not yet clear, and a great deal of literature was currently being published to

attempt to identify their exact nature. He had not been involved in the most recent negotiations concerning the crime of aggression, as there was no obvious role for the United Nations Secretariat to play in the matter, which was very controversial. However, the Secretariat, in particular the Office of Legal Affairs, had taken on a leadership role in efforts to combat impunity and ensure accountability for serious crimes. The statutes of the ad hoc international criminal tribunals had been drafted by his predecessors, and his Office provided practical support for the activities of the International Criminal Court. The atmosphere of consensus and optimism that had made the establishment of the ad hoc tribunals possible in the 1990s no longer existed, as exemplified by the recent discussions on the Kampala Amendments and on the triggering of the jurisdiction of the International Criminal Court over crimes of aggression which had departed from the tradition of consensus. It was therefore important to build the greatest possible consensus around any topic of international criminal law, for the sake of the global effort to combat impunity and ensure international criminal justice.

He agreed that conciliation was an underutilized tool and was therefore very pleased that Australia and East Timor had recently completed successful conciliation proceedings under the United Nations Convention on the Law of the Sea, in what had been the first-ever use of that mechanism. He hoped that other States would follow their example in the future.

He appreciated the recognition of the work and commitment of his staff, and wished to publicly commend them for their efforts.

In his view, disputes such as the one concerning the cholera epidemic in Haiti could not be dealt with under tort law. However, the situation had certainly revealed a gap in the global legal framework: there were no clear rules on how to deal with allegations of large-scale human rights abuses or other violations by an international organization. His Office had conducted a small comparative analysis which had revealed that it would have been difficult to deal with the matter of the Haitian epidemic under the tort laws of a number of States, including France, the United Kingdom and the United States. It could therefore be useful for the Commission to examine the limitations of the framework under which the United Nations and other international organizations were operating. That said, the main issue in connection with the epidemic in Haiti was not the question of the legal responsibility of the United Nations, but rather the Organization's prolonged inaction. No position taken by the Legal Counsel could prevent the United Nations from taking meaningful action to address any problem.

The Chair said that the opinion of the Legal Counsel with regard to the Commission's programme of work would be very useful for the Commission.

Mr. Hassouna thanked the Legal Counsel for his statement. He asked how budgetary constraints had affected the legal activities of the United Nations, and in particular those of the Codification Division. He would also be interested to know whether the Legal Counsel subscribed to the view of many Member States that peacekeeping operations were often established by the Security Council as an easier alternative to the settlement of complex conflicts.

Mr. Jalloh said that the Office of Legal Affairs carried out excellent work and had provided tremendous support to the Commission for the session in New York, although he felt that it could benefit from additional resources.

He asked whether the Legal Counsel could provide any further information with regard to the establishment of the Hybrid Court for South Sudan. He recalled that the agreement between the African Union and the Government of South Sudan had been drafted, with excellent support from the Office of Legal Affairs, but had yet to be signed by the parties.

Mr. Park, recalling that the Secretary-General had acknowledged the role of the United Nations in the cholera epidemic in Haiti, requested an update on the class action lawsuits concerning the matter that had been brought against the United Nations before the domestic courts of the United States.

Mr. de Serpa Soares (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that the Organization's financial situation had not had a significant impact on the Office of Legal Affairs. Its budget had remained relatively stable in recent years, and it had sufficient financial and human resources. Staff salaries accounted for 80 per cent of the budget. His team comprised only 200 staff, which meant that it was able to operate very efficiently, as he knew each of his staff members personally and was able to quickly assign them to the projects where they were most needed. He had welcomed the decision by Member States to include the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law in the regular budget, as that would make it possible to further develop the Programme.

The legal questions relating to the changing nature of peacekeeping operations were very interesting, and at times extremely complex. The increasing use of military force to protect civilians, support national armies or, as

in the case of MINUSMA, support coalitions gave rise to new legal issues that had not yet been resolved.

The situation with regard to the Hybrid Court for South Sudan was frustrating. All the legal instruments had been prepared and presented to the Government of South Sudan, which had accepted them, but the matter was now before the Parliament, and he feared that problems would arise at that stage. There was no further technical work for his Office to do. It was now up to the African Union, which was leading the process, to decide whether to push for its completion.

In response to Mr. Park's comment, he said that the Secretary-General had not recognized the responsibility, including the legal responsibility, of the United Nations in connection with the cholera epidemic in Haiti. A class action lawsuit involving a claim for approximately \$40 billion had been brought before the domestic courts of the United States. In August 2016, a United States appeals court had upheld the immunity of the United Nations and dismissed the plaintiffs' arguments that immunity should be waived and that the matter should be adjudicated in a United States court under United States tort law. The court's reasoning on the issues of immunity and the apparent contradiction between the right to access to justice and the right to immunity were very interesting. Another class action suit had been brought in the United States and was currently at the appeal stage, but he expected the outcome to be similar.

Mr. Grossman Guiloff said that the presentation by the Legal Counsel would help the Commission to see where its independent work fit with the issues that the Office of Legal Affairs viewed as being important for the international community. Staff from the Office of Legal Affairs had provided excellent support for the session, both in the production of documents and in the provision of personal assistance to the members of the Commission.

He agreed with Mr. Murphy that the regional course in international law delivered in Santiago had been a great success. He had been particularly struck by the calibre of the students.

Time and resources were factors that must be taken into account by the Office of Legal Affairs when determining whether to issue a legal opinion, since its work on the application of customary law, treaty law and internal rules did not leave it much time to dedicate to drafting opinions.

He had appreciated the Legal Counsel's initiative to seek comments and observations from international organizations on their international responsibility. The

responses received from approximately 24 legal counsels from different organizations had been very enlightening and had broadened his understanding of the role of legal counsels.

Mr. Tladi said that he very much appreciated the excellent support provided by the Office of Legal Affairs. He hoped that the comparative analysis that the Legal Counsel had mentioned had included the laws of countries from regions such as Africa that were often neglected in such exercises.

He asked whether the Legal Counsel was at least considering making a submission in response to the International Criminal Court's explicit request of March 2018 for the United Nations to submit its observations on the legal questions raised by Jordan in its appeal pending before the Appeals Chamber in connection with *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, which concerned the interpretation of Security Council resolution 1593 (2005).

Mr. Gómez-Robledo said that the Office of Legal Affairs provided excellent support to the Commission. He particularly appreciated the work of the Codification Division and the Treaty Section in support of his work as the Special Rapporteur for the topic "Provisional application of treaties", which had included the preparation of three memorandums. He welcomed the move to have members of the Secretariat present their own work to the Commission, which gave them the visibility and recognition they deserved.

Turning to the dispute between the Guyana and the Bolivarian Republic of Venezuela, he asked what technical assistance the Office of Legal Affairs would provide to the parties. He would also be interested to hear what the reaction of the Bolivarian Republic of Venezuela had been to the application filed by Guyana in March 2018.

Mr. de Serpa Soares (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that holding the regional courses in international law in locations where the economic commissions were based reduced costs and simplified logistics. The facilities in Santiago were excellent.

He did not intend to submit any observations in response to the request from the International Criminal Court. His view was that the Legal Counsel of the United Nations should generally refrain from intervening in judicial proceedings of any nature, although he would consider exceptions on a case-by-case basis. However, he was following the matter closely and was participating in discussions with the Commission and judges at the International Criminal Court.

With regard to the territorial dispute between Guyana and the Bolivarian Republic of Venezuela, the question currently at issue was whether the International Court of Justice had jurisdiction to hear the case, which the Bolivarian Republic of Venezuela disputed. The Court would also have to rule on whether the Secretary-General had the authority, on an exceptional basis under the 1966 Geneva Agreement, to refer the matter to the Court. He would not comment on why Guyana had decided to file an application with the Court. That path was legally available to Guyana, and it was up to that country to determine whether it was the best political decision. The move could put additional pressure on the Government of the Bolivarian Republic of Venezuela to negotiate the settlement of the dispute, which had begun more than a century ago and involved around two thirds of the territory of Guyana. The prolongation of the long-running dispute was certainly not beneficial to either party. The Office of Legal Affairs could provide assistance in a number of ways, including by supporting the work of the various mediators and the Department of Political Affairs. It was possible that a compromise could involve the exchange of maritime areas for land, in which case his Office could provide specific technical assistance in relation to matters concerning the law of the sea. His Office stood ready to assist the parties, but could do so only at their request.

The Chair thanked the legal counsels of many permanent missions for attending the meetings of the Commission. Their presence showed that the Commission had achieved one of its main goals for holding the first part of its seventieth session in New York.

Identification of customary international law
(agenda item 6) (*continued*) (A/CN.4/710, A/CN.4/716 and A/CN.4/717)

The Chair invited the Commission to resume its consideration of the fifth report on identification of customary international law (A/CN.4/717).

Mr. Hassouna said that it was noteworthy that, as the Special Rapporteur had mentioned in his report, the draft conclusions and commentaries adopted on first reading had already received attention from practitioners and scholars. Once the Commission completed the second reading of the draft conclusions and commentaries, and once they were adopted by the General Assembly, they would be of great assistance to practitioners and courts in identifying the rules of customary international law.

Although he had previously expressed reservations concerning the abundance and length of the footnotes

included in earlier reports on the topic, he recognized that the footnotes provided valuable material for inclusion in the commentaries. Although the wording of the draft conclusions was necessarily broad, so as to reflect the flexibility inherent in custom as a source of international law, the text would benefit from greater precision. Similar critiques had come from the Asian-African Legal Consultative Organization, which had called for greater precision either in the draft conclusions or in the commentaries, and from New Zealand, which had noted that the desire to keep the draft conclusions brief and not overly prescriptive had resulted in general statements that did not always provide clear guidance. The Special Rapporteur had addressed those concerns by emphasizing the importance of reading the draft conclusions together with the commentaries and had also agreed that several points that had been addressed in the commentaries could be reflected in the draft conclusions. He welcomed the Special Rapporteur's flexibility and readiness to provide greater precision with respect to a number of issues and expressed the hope that he would take a similar approach to the suggestions that would be made in the current debate.

Turning to the draft conclusions themselves, he agreed with the Special Rapporteur that the addition in draft conclusion 1 (Scope) of a separate statement on the relationship between customary international law and other sources of international law, as some States had suggested, was not necessary. However, he encouraged the Special Rapporteur to further clarify that issue in the commentary, particularly as it related to *jus cogens*.

With regard to draft conclusion 2 (Two constituent elements), he agreed with the view of some States that there was a need for caution when using a deductive approach. He therefore supported the Special Rapporteur's suggestion that changes might be suggested in the commentary to clarify that the reference to "deduction" was not intended to suggest a substitute for the basic two-element approach.

Turning to draft conclusion 3 (Assessment of evidence for the two constituent elements), he disagreed with the view of some States that the legal opinions of States that were not engaged in a certain practice were irrelevant. He supported the view of the Special Rapporteur that an inquiry into the *opinio juris* that might accompany instances of the relevant practice should be complemented by a search for the *opinio juris* of other States in order to verify whether States were generally in agreement or were divided as to the binding nature of a certain practice.

With regard to draft conclusion 4, he supported the view of most States endorsing the position contained in

paragraph 2 that “in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law”. At the same time, the circumstances in which the practice of international organizations might be relevant should be elaborated and clarified in the commentary. He supported the Special Rapporteur’s proposed changes to highlight the primacy of State practice while also recognizing the relevance of the practice of international organizations. He did not agree with the suggested addition of the word “may” in paragraph 2, however, since it would unjustifiably downgrade the practice of international organizations that was already limited by the terms “in certain cases” at the beginning of the paragraph.

With respect to paragraph 3, concerning the conduct of other actors, he supported the view of States questioning the relevance in that context of non-State entities, in particular non-State armed groups. There was a need to clarify in the commentary the circumstances under which the conduct of other actors could be taken into consideration when assessing relevant practice.

He concurred with the suggestion of some States that draft conclusion 6 should also cover the practice of international organizations. He further agreed with most States that only deliberate inaction could be considered as practice. While he did not share the view that only decisions of higher courts might constitute State practice, they should still be accorded greater weight. In general, he supported the suggestions of the Special Rapporteur, which could be reformulated in the Drafting Committee. With regard to paragraph 3 on the issue of hierarchy, his preference was to retain it.

With regard to draft conclusion 8 (The practice must be general), he agreed with the Special Rapporteur’s suggestion to replace the term “consistent” with “virtually uniform” in paragraph 1. While some States criticized the absence of a reference to “specially affected States” and others questioned why that notion should be given undue importance, he was of the view that how and the extent to which the practice of specially affected States should be taken into account should be made clear in the commentary.

Turning to draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences), he agreed with the States that had expressed general approval of its content, while calling for greater precision in its formulation. He further agreed with the States that suggested that the particular relevance of General Assembly resolutions should be highlighted, since it was a plenary organ of near-universal participation reflecting the collective opinions

of its members. Indeed, he viewed the reference in the commentary to the “special attention” paid to them as insufficient and would support highlighting their special importance in the commentary or even in a separate paragraph of the draft conclusion.

In that connection, he disagreed with the view, a reference to which had been included in footnote 277 of the report, according to which it was not always clear whether the acts of the General Assembly, a political organ, carried juridical significance. The public acts of a State undertaken in the General Assembly could have juridical weight when States chose to give it such weight. Examples included the explicit reference by the International Court of Justice to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which had been adopted by the General Assembly in its resolution 2625 (XXV), in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Likewise, in its advisory opinion on *Legality of the Use of Threat of Use of Nuclear Weapons* the Court had noted that General Assembly resolutions may sometimes have normative value and that they could provide evidence for establishing the existence of a rule or the emergence of an *opinio juris*.

Furthermore, the Security Council was also a political body, but its decisions taken under Chapter VII of the Charter of the United Nations were nonetheless viewed as binding law. He supported the Special Rapporteur’s suggestion, made in connection with draft conclusion 12, that a clearer distinction could be drawn between resolutions of international organizations and those of ad hoc international conferences.

With regard to draft conclusion 13 (Decisions of courts and tribunals), he supported the distinction that the Special Rapporteur had made between the decisions of national and international courts. However, the emphasis made in the commentary that the value of all decisions might vary depending on the quality of the reasoning, the composition of the court or tribunal, the reception given to the decision as well as other considerations, introduced some subjective criteria and raised the question of which party might be entitled to evaluate them and on what basis. The same applied to writings which, as suggested in the commentary to draft conclusion 14 differed greatly in quality, a criterion that was difficult to determine objectively. He asked the Special Rapporteur to suggest more objective criteria that could be used instead.

Turning to draft conclusion 15 (Persistent objector), he agreed with the view that there were weaknesses in the theory underlying the persistent objector rule, such as insufficient State practice and a lack of consistent application, and that the rule remained controversial and should not be subject to abuse. For the sake of clarity, the circumstances under which the application of the rule had been corroborated by State practice, and those under which its application was contested, could be included in the commentary. He supported the suggestion by the Special Rapporteur to add paragraph 3, which would stipulate that the draft conclusion was without prejudice to any question concerning *jus cogens*, and would favour including in the commentary the view expressed by some States that the rule might also not be applicable in relation to other fundamental rules, such as those pertaining to international humanitarian law.

With regard to draft conclusion 16 (Particular customary international law), he agreed with the view that rules of particular customary international law might operate among States linked by a common cause, interest or activity other than their geographical position. Examples of such rules should be included in the commentary. He also supported the view that a rule of particular customary international law might apply between as few as two States, a position that had been upheld by the International Court of Justice. The reference to bilateral customary international law should therefore be retained. Lastly, he agreed with the Special Rapporteur that the reference to regional, local or other particular customary international law in paragraph 1 was satisfactory and the paragraph did not require redrafting. Examples of “other” particular customary international law should be included in the commentary.

He thanked the Secretariat for preparing the memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710), which contained information collected from States and other sources as well as valuable suggestions for improving the availability of the evidence of customary international law, such as the suggestion to develop online repositories to facilitate the publication of States’ legislative, judicial and executive practice, and the suggestion to enhance regional cooperation between States and within regional institutions to make evidence of State practice and *opinio juris* more readily available. In principle, he fully endorsed all those suggestions and supported forwarding them to the General Assembly for its consideration.

With regard to the final form of the Commission’s work on the topic, he noted that the Special Rapporteur had indicated that after considering the matter carefully, he had developed the view that the term “conclusions”

was appropriate for the topic. However, he did not explain the considerations that had led him to that view. Consequently, some members of the Commission had doubts as to whether that term was appropriate, he suggested that the Special Rapporteur should elaborate on his reasons for choosing “conclusions” over “guidelines” in his summing up of the debate on the topic.

He fully supported the Special Rapporteur’s recommendation that the General Assembly should take note of the conclusions, annex them to a resolution and ensure their widest dissemination; and that it should welcome the Secretariat’s memorandum.

He recommended that all 16 draft conclusions should be referred to the Drafting Committee in the light of the comments made in the debate and thanked the Special Rapporteur for his excellent report on a topic that, once completed, would represent an important contribution to the work of the Commission.

Mr. Hmoud thanked the Special Rapporteur for his report, which contained a comprehensive analysis of the views of States on the topic and was informed by the first reading of the draft conclusions. He was also grateful to the Secretariat for its comprehensive memorandum. Noting the disparity in resources between the different regions, the inconsistency of the types of evidence, the scarcity of resources relevant to international law and the linguistic imbalance that existed among the various sources, he hoped that the suggestions set out in the memorandum would raise awareness of the need for better access to the evidence, at the national, regional or international levels. Cooperation between the United Nations, States and other relevant international organizations would enhance the availability of evidence and resources pertaining to customary international law. States should be encouraged to publish digests of their practice and to use modern technologies to disseminate the material relevant for the identification of customary international law.

Turning to the report, he welcomed the significant number of States that had participated in the debate in the Sixth Committee or had submitted written observations on the topic. The draft conclusions had garnered broad support from States, which attested to the tremendous efforts made by the Special Rapporteur and the Commission to take a balanced approach in preparing a text that was based on the state of the law and on solid legal arguments. The draft conclusions purported to be a practical yet authoritative guidance for practitioners, States and tribunals in the identification of the rules of customary international law, without being overly prescriptive. The fact that the text adopted on first reading had been cited by courts and in scholarly

writings was indicative of the value that the draft conclusions already had.

On draft conclusion 1, he said that the determination of the existence and content of customary international law had always been the legal issue underlying the scope of the topic. While the process by which customary international law evolved over time was important, it was a descriptive exercise that was not governed by legal rules and therefore was not suitable for inclusion in the draft conclusion. As to the question of whether there existed a burden of proof when identifying a rule of customary international law, he agreed with the Special Rapporteur that that was a procedural, rather than substantive analytical, matter that fell outside the scope of the topic and differed from one national legal system to another; at the international level, the courts identified such rules in accordance with their rules of procedure and with the assistance of the parties.

With regard to draft conclusion 3, which had been discussed at length by the Commission and the Drafting Committee, States appeared to support an approach where the evidence for both the subjective and the objective elements was assessed independently. Evidence of *opinio juris* from the opinions of States that did not participate in the practice would thus be considered relevant. He concurred with the Special Rapporteur's view, which was based on the opinions and dicta of the International Court of Justice, that ascertaining the acceptance of the law by States other than those participating in the practice was crucial for identifying the existence of the rule.

With respect to draft conclusion 4, he had long held the view that the term "general practice" referred not only primarily but exclusively to the practice of States, which created the rules of customary international law. The practice of international organizations could be evidence of the existence of State practice, but it was not a constitutive element of general practice nor was there any evidence either in material from national and international courts, or in State material, that it contributed to the formation and creation of a rule of customary international law. Although States conferred certain competences to an organization when they established it, the organization's practice did not constitute State or general practice for the purpose of the creation of customary international law. Its practice could verify or reflect State practice, but State practice was, nonetheless, the relevant practice.

The contribution of the practice of international organizations to the creation of customary international law could be considered in the context of *lex ferenda*, although the weight of its contribution was debatable.

Under the draft conclusions, the reaction by a State to the practice of the organization should not be relevant for determining its acceptance as law. However, taking the Special Rapporteur's proposed changes into account, paragraphs 1 and 2 could be read as indicating that the practice of international organizations had evidentiary value with respect to the identification of customary international law. The practice of an international organization, which was undertaken on behalf of the States members of the organization, in accordance with its delegated and exclusive competencies, could constitute relevant practice, but only to the extent that it was considered State practice. The practice of international organizations could influence the practice of States, which could lead to the creation of a rule of customary international law, but general practice remained the practice of States. Also, the interaction between an international organization and any of its members could lead to binding rules between the State and the organization, but that fell outside of the scope of the topic and was governed by special rules that existed between the organization and such a State.

With regard to the issue, set out in paragraph 45 of the report, of how to establish acceptance as law (*opinio juris*) on the part of international organizations, he was of the view that, while it might be possible to identify the *opinio juris* of an organization, only the *opinio juris* of the community of States should be considered a constitutive element in the creation of a rule of customary international law. Considering that thousands of international organizations existed, it would be impossible to use the *opinio juris* of international organizations to identify broad acceptance; only the *opinio juris* of States could be so identified. As stated in paragraph (5) of the commentary to draft conclusion 9 (Requirement of acceptance as law (*opinio juris*)), it was not necessary to establish that all States had recognized (accepted as law) the alleged rule as a rule of customary international law; it was broad acceptance together with no or little objection that was required. The challenge was to determine what constituted that "broad acceptance as law with no or little objection".

With regard to draft conclusion 6 (Forms of practice) and the proposed addition of the word "deliberate" before "inaction" in paragraph 1, he was of the view that, while not objectionable, the insertion was unnecessary. Inaction constituted a form of practice only when the rule generally involved the prohibition of action, such as the rules on the prohibition of the use of force or refraining from action (negative action). Thus, a State contributed to the conduct giving rise to the prohibitive rule by refraining from committing an

unlawful act. Such inaction was presumed to be deliberate and there was therefore no need to insert the word “deliberate” in the paragraph. With regard to paragraph 3, on the hierarchy of the various forms of practice, he had no strong views on whether to keep it in the text of the draft conclusion or to move it to the commentary, although he felt it was important to stress that more weight should be given to the practice by the entity that was directly associated with the content of the rule or the subject of the practice.

Turning to draft conclusion 8, he noted that the courts used the terms “consistent” and “virtually uniform” interchangeably and, although the former allowed for more flexibility, he did not have strong views on the matter.

Although he did not want to reopen the debate on the issue of specially affected States, he recognized that, in the literature, the suggestion to take into account the practice of those States had been taken to refer to the practice of the great powers of the permanent members of the Security Council. Indeed, although such powers or members did not have a special status with respect to the formation of the rules of customary international law, the conduct of States that were directly affected by the rule to be created was indeed relevant to the creation of the rule. The key issue was that for the practice to be general the community of States as a whole had to participate in it. The same logic would apply in identifying the reaction of specially affected States to the practice, and determining whether or not their acceptance as law by could affect the formation of a rule.

Taking up draft conclusion 9, he returned to the question of how broad acceptance by States of a rule of customary international law should be determined. In its deliberations on the topic, the Commission had concentrated more on identifying the *opinio juris* of the individual State, not the *opinio juris* of the community of States, which was a necessary element for identifying the rule, and had not sufficiently debated the threshold of participation by States in the *opinio juris*. Although in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had stated that the profound division in the international community on the matter of whether non-recourse by a certain number of States to nuclear weapons constituted the expression of an *opinio juris* had led it to conclude that no acceptance as law could be said to exist, that statement did not constitute sufficient evidence of the threshold of acceptance as law by States. More sources for that proposition should be identified and a provision on the threshold should be included in the text of the draft conclusion.

With regard to draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)), he urged caution when treating inaction as evidence of *opinio juris*. States sometimes did not react for political reasons or because they did not have the capacity, interest or awareness to react to a practice. Therefore, inaction by a State was evidence of acceptance as law only when that State was in a position to react and the circumstances called for such reaction. The key evidence for determining whether the rule satisfied the subjective element for the creation of a rule was to be found in the positive reaction of other States. Paragraph 3 had been formulated to appropriately take into account the weight and value of inaction as evidence.

On the significance of certain materials for the identification of customary international law, he concurred that there was a distinction between the value of treaties, which were legal acts undertaken by States, and the value of resolutions of international organizations and intergovernmental conferences, which took a variety of forms and could be adopted as political, economic or other actions. Those resolutions might express the will of the relevant actors and constitute evidence of *opinio juris*, but the value of such evidence depended on the circumstances surrounding their adoption, including the representativeness of the body, the form of participation, the voting process and the level of participation. He supported the suggestion by the Special Rapporteur that the potential importance of General Assembly resolutions in contributing to the development of customary international law could be further highlighted in the commentary to draft conclusion 12.

Turning to draft conclusion 13, he reiterated his position that the decisions of international courts, particularly those of the International Court of Justice, were not just subsidiary means for the determination of the existence of rules of customary international law but a primary source and should be treated as any other evidence to identify the existence of such rules. The word “subsidiary” meant that if other evidence was inconclusive then one should draw on the decisions of international courts, which was not true as a matter of practice and should not be as a matter of law. He concurred with the position of Spain as set out in paragraph 98 of the report that the fact that judicial decisions were not independent sources of international law, but were subsidiary to independent sources, did not mean that, in relation to the determination of law, that they played a secondary role.

Turning to draft conclusion 15 (Persistent objector), which had been endorsed by most States that had addressed the matter, he was of the view that the draft conclusion reflected *lex lata* and set the necessary

high threshold for the application of the persistent objector doctrine. He had no objection to the addition of the “without prejudice” clause in respect of any question concerning *jus cogens*, even though he understood the point made earlier in the debate that there were other draft conclusions to which a “without prejudice” clause could have been added.

With regard to draft conclusion 16 (Particular customary international law), he was of the view that a rule of particular customary international law might operate among States that were linked by a common cause or activity other than geographic position, such as economic integration or trade pacts, and therefore the word “other” in paragraph 1 should be maintained. He agreed that the addition of the phrase “among themselves” in paragraph 2 would clarify that acceptance as law of a particular customary rule only applied between the States concerned.

With regard to the form that the Commission’s output should take, he was of the view that the text codified, for the most part, existing law and that the term “conclusions” denoted a statement or pronouncement on the rule of law in the field better than the term “guidelines”.

He thanked the Special Rapporteur for his great contribution to the topic and recommended that the draft conclusions should be referred to the Drafting Committee.

Mr. Nolte said that he held a different view from Mr. Hmoud, who said that only States, not international organizations, played a role in the formation of customary international law. He asked whether, on the basis of Mr. Hmoud’s view, it would be appropriate to presume that an international organization’s actions reflected the actions and the agreement of its member States, if there were no indications to the contrary. He asked whether, in that event, it would be possible to imagine a world without international organizations as such, since they would only serve as a reflection of their member States. He wondered whether such a position was desirable, because if such a presumption was not possible, then States would have no good reason to create international organizations, since in doing so they would lose their power to contribute to the formation of customary international law.

Mr. Hmoud said that he was not as stringent on that point as might be perceived. It was generally agreed that international organizations could trigger a practice. There were cases, such as that of the European Union, where an organization was delegated with authorities to act on behalf of its member States. In such case, if a State delegated part of its authority — which could

sometimes be revocable — to the international organization to act on its behalf, the State would still be contributing to the formation of a customary rule through the practice of that organization. Nonetheless, one of the key issues in that regard was the challenge of establishing *opinio juris* in a world composed of thousands of international organizations. Another issue that had not been discussed sufficiently by the Commission was the relationship between the organization and its individual member States and the special rules that governed that relationship.

Mr. Park said that it was important to ensure coherence in the Commission’s work on related topics, such as the topics of identification of international customary law and subsequent agreements and subsequent practice in relation to the interpretation of treaties. He urged the Drafting Committee to bear that goal in mind and to ensure, especially in the commentary on the current topic, that the wording of paragraph 2 of draft conclusion 4 was consistent with the wording of paragraph 3 of draft conclusion 12 [11] (Constituent instruments of international organizations) and paragraph 4 of draft conclusion 13 [12] (Pronouncements of expert treaty bodies) of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Mr. Saboia said that he wished to congratulate the Special Rapporteur on his well-structured report. He particularly appreciated the updated bibliography, which included works by four distinguished legal professionals from his country. The conclusion of the work on the topic and the presentation of that memorandum at the current session demonstrated that the Commission continued to promote contemporary understanding of timeless topics of international law.

While some States had expressed concerns regarding the balance between making the draft conclusions concise and ensuring that the commentaries did not contain qualifications that would appear to contradict the draft conclusions, as noted in paragraphs 16 to 18 of the report, the Special Rapporteur argued convincingly in paragraphs 19 to 22 that the draft conclusions, read together with the commentaries, represented an appropriate balance between rigour and flexibility and constituted a useful tool for practitioners in identifying the current state of customary international law.

He concurred with the States that felt that more attention could have been devoted to the formation of customary international law in draft conclusion 1 (Scope). That matter could be explored in greater depth in the commentary.

With regard to draft conclusion 4, he said that the controversy concerning the role of international organizations in the formation of rules of customary international law was reflected in the comments by States. In his view, refusing to recognize the role of international organizations in the formation of custom was tantamount to denying their obvious and increasingly significant role in international relations, in particular in the regulation of activities and the establishment of rules concerning inter-State relations. While many acts of international organizations were legally conducted by their member States, there were a growing number of areas in which organs of international organizations acted with discretion.

A great deal of competence had been attributed to the United Nations, specialized organs of the United Nations system, treaty bodies, international courts and tribunals and the World Trade Organization, to name a few. The work conducted by the Commission itself over the past 70 years was an eloquent example of the role of international organizations in the creation of international law. Moreover, paragraph 44 of the report contained a number of examples of situations in which acts of international organizations might be sources of practice and *opinio juris* relevant to the formation of customary international law. It should also be noted that the International Court of Justice had on several occasions recognized that international organizations were subjects of international law endowed with a certain level of autonomy, and thus capable of contributing to the creation of customary rules of international law. He supported the arguments put forward by Ms. Galvão Teles concerning the need for proper acknowledgement that international organizations were subjects of international law and that their acts might, consequently, contribute to the formation of customary law. That contribution could concern both rules that affected organizations and rules that affected States and organizations alike. For those reasons, he did not support the Special Rapporteur's proposed changes to draft conclusion 4.

Turning to draft conclusion 6, he said that the proposed reference to "deliberate inaction" in paragraph 1 did not adequately reflect the complex nature of the way in which inaction could be considered a form of practice. As Mr. Murase had stated, the question of whether inaction was deliberate or not was subjective. Moreover, the proposed wording would not help practitioners to identify and apply new norms of customary international law. Previous formulations referring to "certain circumstances" under which inaction could be counted as practice were more appropriate.

The proposed amendment to paragraph 2 of draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences) did not accurately reflect the role played by international organizations in the formation of international law and contemplated only a limited role for them in the identification of international law. He would favour retaining the wording adopted on first reading, which better reflected the current role of international organizations in international law.

He welcomed the Special Rapporteur's statement in paragraph 109 of the report that draft conclusion 15 (Persistent objector) and the commentary thereto had been adopted bearing in mind the need to prevent abusive reliance on the persistent objector rule. He was sympathetic to the view by Greece that the rule was inapplicable not only in the case of *jus cogens* norms but also in respect of the broader category of the general principles of international law. The Nordic countries had rightly expressed concern about States potentially objecting to certain categories of rules and stressed the need to ensure universal respect for fundamental rules, in particular those for the protection of individuals. The proposed new "without prejudice" clause was therefore undoubtedly an improvement. However, it should be drafted in such a way as to clearly state that the persistent objector principle did not apply if it would result in a conflict with a peremptory rule of general international law (*jus cogens*).

Referring to draft conclusion 16 (Particular customary international law), he could accept the proposed amendment to paragraph 2. While he recognized the existence of regional customary law, he was somewhat sceptical about the concept of particular customary international law based solely on like-mindedness. Furthermore, the draft conclusion was too broad, as it did not refer to any links with general international law that could preserve the systemic and substantive coherence of international law.

With regard to chapter II of the report, he wished to reiterate his appreciation for the comprehensive work undertaken by the Secretariat in preparing the memorandum on ways and means for making the evidence of customary international law more readily available, which was an important contribution to the work on the topic. He supported the Special Rapporteur's proposals concerning the implementation of the suggestions contained in the memorandum. He also supported the Special Rapporteur's recommendations on the final form of the Commission's output on the topic.

The meeting rose at 1 p.m.