Statement
on behalf of the
Republic of South Africa

by

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(International Law)

at the

Department of International Relations and
Cooperation of South Africa

before the Sixth Committee of the General Assembly

under the following Cluster 1 topics:

"Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties" and
"Identification of Customary International Law"

22 - 24 October 2018

Mr Chairman

Allow me to join others who have spoken before me in commemorating the 70th Anniversary of the establishment of the International Law Commission. We are pleased that the commemorative events have offered an occasion for reflection on the achievements of the Commission in the progressive development of international law and its codification in the past 70 years. Most importantly it also gave an opportunity to look ahead to the Commission's future and the important contribution that it has to make in the development of a rule based international legal order. The only disappointment, Mr Chairman, is the fact that after 70 years in existence, the composition of the Commission sadly lacks gender representativity with only seven women out of a membership of 34.

Mr Chairman, we wish to thank the Chairman of the Commission, Professor Eduardo Valencia-Ospina, for introducing Cluster 1 topics to this Committee. My delegation associates itself with the statement made by the African Union earlier and to now wants to share some thoughts on the topic "**Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties**". We congratulate Professor Georg Nolte, Special Rapporteur, on the excellent work done on this topic. In the same vein, the Commission should be commended for adopting the two important sets of "restatements" on the second reading, namely, the Draft Conclusions on the Identification of Customary International Law and the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties.

Mr Chairman

The topic of "Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties" goes to the heart of the work that every international lawyer does – treaty interpretation. The matter of the interpretation of treaties – the instruments that are the repositories of rights and obligations that States have *vis-à-vis* each other – directly affects the conduct of relations between States.

While the Vienna Convention on the Law of Treaties remains the primary source of the rules of treaty interpretation, we welcome the clarity that the Commission has provided in its Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

The general rule and means of treaty interpretation as set out in Article 31(1) of the Vienna Convention that a treaty should be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their

context and in light of its object and purpose remains paramount. We therefore see the Draft Conclusions not as new or competing rules, but as strictly as a useful tool in enhancing our understanding of Articles 31(3)(a) and (b) of the 1969 Vienna Convention. Subsequent agreements and subsequent practice should not be seen as a means of amending treaties through interpretation. In all cases where parties wish to amend or modify a treaty this should be done through the procedure prescribed by the treaty itself, or in accordance with the to customary law rules on treaty amendment.

Insofar as the Commentaries to the Draft Articles fail to make the distinction between interpretation and modification or amendment, we wish to make it clear that amendment or modification of a treaty can only take place in accordance with the clearly and deliberately expressed agreement of the parties. This is not only a matter of respect for parties' sovereignty, but also critical for the legitimacy of treaties and the stability of the international legal order. In this regard, we submit that whenever there are two possible interpretations of a treaty, a reasonable interpretation according to the general rule set out in Article 31(1) (interpretation in accordance with the ordinary meaning and in the context of the treaty's object and purpose) should always be preferred.

Mr Chairman

We now turn to the topic entitled "**Identification of Customary International Law**" and congratulate the Special Rapporteur, Sir Michael Wood, on the excellent work done on this topic including the preparation of the conclusions. We also express our sincere gratitude to the Secretariat for its user-friendly memorandum on ways and means for making the evidence of customary international law more readily available. This will allow all relevant stakeholders to better engage with the topic.

Mr Chairman

The identification of customary international law is an important source of public international law, notwithstanding the plethora of treaties whose scope and volume have increased in recent times. To this end, the dissemination of the 16 Conclusions provide a useful guide for public international law actors. South Africa concurs with the "two-element approach" for determining the existence and content of rules of customary international law which enjoys broad support. In addition, we welcome the holistic approach that the Special Rapporteur has proposed. The increasing recourse that national courts have to matters containing elements of international law is indicative of the fact that the Conclusions are not for the exclusive preserve of academia. They find meaning and application in real-life settings, thus dispelling the myth that

public international law is the preserve of a selected few. This augurs well for the progressive development of customary international law. South African courts have, in particular, recently grappled with cases involving international law dimensions. In previous statements in this forum, my delegation has highlighted the fact that the Constitution of the Republic of South Africa (1996) states in Section 232 thereof that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." It is no wonder that this topic is therefore particularly important to my delegation. We further welcome the non-prescriptive nature of the Conclusions which take into account the approach that States, international organizations and international courts have adopted over time.

Mr Chairman

The Conclusions are cognizant of the reality that States are the primary actors in the formation of customary international law. There is a recognition that international organizations may, in certain cases, also contribute to the formation of customary international law. The examples provided in the commentaries are by no means an exhaustive list but illustrate, increasingly, the exercise of public powers by international organizations on behalf of States. Paragraph 3 of Conclusion 4 does not recognize the conduct of non-state actors as expressions of customary international law. The commentaries note, however, that the conduct by these actors may have an indirect role in the identification of customary international law. My delegation looks forward to hearing the views of delegations on this topical issue, the discussion of which is long overdue. Similarly, Conclusion 5 defines state practice as encompassing the conduct of the state, whether in the exercise of its executive, legislative, judicial or other functions. The conduct of any organ of a state is deemed to be the conduct of the state as a whole. This is irrespective of whether the conduct is by a provincial, local or central government actor. According to the commentaries, the manner in which a State treats its own nationals may also affect and have implications for international law. The experiences of other States vis-à-vis this draft Conclusion will be instructive. In respect of Conclusion 8 in terms of which the practice must be general, my delegation read with interest the comments and observations received. It is my delegation's view that military and economic power are irrelevant for a determination of whether a State is "specially affected" and we propose that a more nuanced approach be taken in terms of the concerns expressed. In respect of the *persistent objector* principle found in Conclusion 15, the inclusion of this principle is to be welcomed. South Africa is of the view that the temporal nature of the objection is imperative and that the invocation of this rule should be subject to stringent requirements.

Mr Chairman

My delegation remains concerned about the scarcity of resources from all jurisdictions insofar as international law is concerned. In this regard, we concur with the Secretariat that yearbooks of international law detailing State practice and national treaty collections are critical bibliographic resources. My Office prides itself on its consistent involvement and contribution to the South African Yearbook of International Law and on being home to the South African Treaty Section, which has grown from strength to strength in the past few years and proves an invaluable resource to the South African Government.

Mr Chairman,

Turning now to the decision by the International Law Commission to place the topic, "Sea-level rise in relation to international law", on its long-term programme of work, we note that the Intergovernmental Panel on Climate Change (IPCC) recently released a special report on the impacts of global warming of 1.5 °C above pre-industrial levels. The IPCC indicates that Global Warming will continue to cause long-term changes, including sea-level rise.

This reality will have consequences, including consequences for the existing international law framework. We hear the concerns raised in relation to whether state practice is at a sufficiently advanced stage to warrant progressive development and codification. International law is often accused of being too reactive and slow to address issues. We now have the opportunity to timely deal with the legal questions that will be created as a result sea-level rise.

Thank you for your attention.