ESPAÑA

INTERVENCIÓN
DEL PROFESOR CARLOS JIMÉNEZ PIERNAS
JEFE DE LA ASESORÍA JURÍDICA INTERNACIONAL
DEL MINISTERIO DE ASUNTOS EXTERIORES, UNIÓN EUROPEA Y COOPERACIÓN
DE ESPAÑA

EN LA SEXTA COMISIÓN
DEL 73 PERÍODO DE SESIONES DE LA ASAMBLEA GENERAL
DE LAS NACIONES UNIDAS

Tema 82. Informe de la Comisión de Derecho Internacional sobre la labor realizada en su 70° período de sesiones (PARTE I)

Nueva York, 23 de octubre de 2018

(Cotejar con intervención definitiva)

STATEMENT
BY PROFESSOR CARLOS JIMÉNEZ PIERNAS
HEAD OF THE INTERNATIONAL LAW DIVISION
OF THE MINISTRY OF FOREIGN AFFAIRS, EUROPEAN UNION AND COOPERATION
OF SPAIN

AT THE SIXTH COMMITTEE
OF THE 73nd SESSION OF THE UN GENERAL ASSEMBLY

Agenda item 82. Report of the International Law Commission on the work of its 70th session (CLUSTER I)

New York, 23 October 2018

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MISIÓN PERMANENTE DE ESPAÑA EN LAS NACIONES UNIDAS
245 EAST 47TH STREET , 36TH FL., NUEVA YORK , N.Y. 10017 TEL. (212) 661-1050

Mr Chairman,

It is an honour for me to address this Sixth Committee on the work of the 70th session of the International Law Commission. I will begin by referring to the issue of subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Spain welcomes the completion of this work, whose progress has had the opportunity to examine in preceding addresses to this Committee. Here, we must pay tribute to the efforts made by the Special Rapporteur, Mr George Nolte, for his hard work over the years, highlighting the difficulty of the task that he has completed. We should be satisfied with the draft conclusions adopted on second reading by the International Law Commission, which we are now considering.

However, a matter of doubts have arisen regarding the methodological premise and the general focus of the draft under consideration. Such doubts are not confined to this draft, but encompass preceding work and other ongoing work before the International Law Commission. We are referring to the lack of ambition which has long characterized this Commission's work, with texts having little, or insufficient, normative content, regardless of whether they are guidelines, conclusions, or take any other form. Such terminology denotes the care being taken to not skirt, much less cross, the normative threshold. It would be advisable for the Commission to reflect on the real possibility of achieving anything in the field of codifying and progressively developing International Law, , although we understand that the political enviroment might not be propitious for ambitions of codification

Chapters I, II, III, and IV: Subsequent agreements and subsequent practice in the interpretation of treaties

Mr Chairman,

Leaving aside this preliminary matter, it is undeniable that the results achieved in this area are, generally speaking, balanced, and largely reflect the most representative elements of international practice as a whole, constituting developments that could be considered *codifiers* in the true sense of the term. In this regard, it must be acknowledged that it has been positive to limit the work to the firm terrain of the relevant provisions of the Vienna Convention on the Law of Treaties of 23 May 1969. Specifically, to the provisions set forth in Articles 31 and 32, which undeniably declare the existence of customary international law in this area. We also welcome the fact that the draft adopted has revised the terminology regarding the possible operability of Article 32 to bring it in line with its true content, in accordance with the suggestions made by our delegation, thus technically improving the mentions made in different conclusions of the draft.

On another issue, we likewise welcome the distinction that conclusion 7—and its commentary—propose between interpretation and modification of the treaty, in line with international jurisprudence. By the same token, we also welcome the reference to consensus that

the commentary to conclusion 11 maintains in the context of those procedures that may lead to agreements within the Conferences of the Parties.

We also consider that a balanced treatment has been given to the practice of international organizations in the conclusions, particularly number 12. And in this respect, we are in agreement with the observations made on this matter by the European Union, including the warning regarding the EU's notable specificities and restrictions as regards the questions under examination.

Nevertheless, Spain continues to have reservations regarding some of the draft's provisions which do merit a cautious approach from our side, given the fact that the work now concluded has not allowed the concerns observed in this regard to be addressed. In this sense, it should be recalled that Spain had already expressed its disagreement with some of its provisions—specifically, conclusions 6 to 10—regarding which it has called for them to be more precise, while at the same time insisting on the need to give them a sufficient normative content[1].

In this regard, the best illustration is that of conclusion 8, the definitive wording of which—given the failure to effect the changes suggested by the Rapporteur in his latest Report—makes it practically superfluous. Similar criticism could be expressed regarding the ambiguous nature of the notion of agreement contained in conclusion 10.

On the contrary, we consider the content finally assigned to conclusion 13—undoubtedly the most controversial and laborious of the entire draft—to be, overall, acceptable. On the one hand, because the reasons provided—both to justify the terminology used and to define the material under consideration—are plausible and sensibly avoid a sectorialization that would be inconsistent with the intended purpose. On the other hand, because the solution regarding the debate on the nature and scope of the "pronouncements" of the bodies contemplated therein, seems the most aligned with the practice of States in this regard, which have conceived such monitoring bodies within a very clearly defined framework of action. The fact is that the activity of these bodies—*auctoritas* aside—can never result in the adoption of acts that are legally binding for States.

Lastly, we would like to express our disagreement with the restrictive approach applied to the characterization of non-State actors when addressing the manifestations of practice, even if this is done for conceptual and systematic reasons. In this respect, we consider that the accompanying commentary should include a reference, at the very least in note form, to the possible practice of other actors with limited but undeniable capacity as international subjects (e.g., colonial peoples, national liberation movements...). This reproach has no underlying intention whatsoever of revisiting the issue of "social practice", regarding which we agree with the negative assessment expressed in the commentary. However, it is not coherent to consider the theory of a practice carried out by a non-governmental organization, without international legal personality, and then fail to mention at least other actors whose capacity as an international subject is limited.

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[1] 5th Report Special Rapporteur, 2018, p. 6, n. 20.

Chapter V: Identification of customary law

Mr Chairman,

We will now address the work of the International Law Commission as regards Chapter V, identification of customary law.

Spain welcomes the completion of this work, whose progress we have followed closely through the speeches given at previous sessions. We would like to take this opportunity to acknowledge and thank the Special Rapporteur, Sir Michael Wood, for all of his work in recent years.

We would also like to thank the Secretariat for its contribution to completing the work that we are examining today, as well as for the suggestions made to promote recording of relevant State practices, and a proper understanding of customary law. Spain has been regularly examining this matter and will intensify such work in the future with that aim, in line with the Commission's proposals.

On the whole, we should be satisfied with the work done and with the draft conclusions adopted on second reading by the Commission, which we are now considering. However, some reservations must be expressed about the methodological decision to opt for a text that declares, from the outset, that it is not of regulatory nature. The result is balanced, and many of the draft conclusions accurately and unambiguously reflect international practice in this topic, which amounts to codification *stricto sensu*.

In this regard, we commend the binary characterization linked to the process of formation of customary law, the definition of the manifestations of practice—including the requirement of general practice—the value of *opinio juris*, the reference to cases of interaction between customary law and other manifestations of international law, and the crucial references to the figure of the persistent objector and to particularity in the scope of customary law. We acknowledge as balanced the treatment the draft gives to the relevant practice of international organizations, while at the same time agree with the European Union's observations on this matter.

Nonetheless, there are certain matters on which Spain has been insisting throughout the work performed to date, which do not seem to be reflected in the completed, revised text we are analysing. This is the case in the forms of practice described in point 1 of draft conclusion 6, in which the reference to "deliberate inaction"—which was initially included in the text—has been removed, although it is mentioned in the accompanying commentary. Given the importance of intentionality in the case of omissions that constitute forms of practice, an explicit reference in the body of the draft conclusions would have been more enlightening.

We also consider it important to draw attention—as Spain has repeatedly done—to the tautological nature of the phrases in draft conclusion 11. As we have previously indicated, our full agreement with the content and characterization of the listed cases of interaction does not preclude Spain from continuing to warn that the term "rule" should be replaced by another expression in the interest of a more appropriate wording.

Mr Chairman,

Earlier, we mentioned that the draft conclusions contain a good dose of codification to the detriment of what could have been an excellent opportunity to clarify unresolved questions, and thus favour a modest, reasonable, and desirable progressive development of the subject, despite being limited to one-off issues.

We are referring to the restrictive content that draft conclusion 12 appears to attribute to the acts of international organizations in the corresponding instances of interaction. It is true that such situations arise very occasionally. However, we are of the view that in comparable circumstances—not identical circumstances—the practice of international organizations, expressed through their acts and resolutions, has the potential to influence a process of establishing customary law, in the same way as a treaty does. Naturally—as indicated in draft conclusion 11—it does not follow that this channel could create a rule of customary international law.

Fault can also be found with the treatment that draft conclusion 13 gives to case law. We must express our dissatisfaction with this, because the proffered characterization reduces the role of case law in the process of identifying rules of customary law, even though it is the usual way of attaining a relatively authoritative determination of customary international law. On this point, we share the view of the Special Rapporteur, Sir Michael Wood, that we must resist the temptation of downplaying the importance of case law, at the risk of contributing to a petrification of customary law, depriving it of its undeniable virtues as part of the process of evolution and adjustment of international law. Although we share these concerns—which are well expressed in the accompanying commentary—we do not understand the need to deemphasize the function of court decisions in identifying and formulating customary law; we therefore recommend a more balanced wording of the draft conclusion.

The same applies to the persistent objector. Spain has repeatedly stated—in keeping with the positions expressed by other members of the Commission—that the draft conclusions' treatment of this matter lacks the necessary consideration of inapplicability to the process of creating peremptory norms. Spain previously expressed its view on this issue, and drew attention to the unsuitability of addressing this question by demoting it to an attached comment. We regret that the Drafting Committee has not decided to include a specific reference to this question in the text of draft conclusion 15.

We also note that it has not been considered a relevant issue to take into consideration in the draft conclusions, the matters relating to the burden of proof in the process of identifying

and forming the content of customary law, despite the observations that Spain has made. However, this remains a crucial question, and one that case law has only addressed in passing. In addition, the draft conclusions offer an opportunity for appropriate systematic integration of this question, without the need for a specific provision.

I would also like to take this opportunity to offer my heartfelt congratulations to the International Law Commission on the celebration of its 70th anniversary. It is my great hope and wish that this body continue to play a key role in the codification and progressive development of international law.

Thank you very much, Mr Chairman.