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Chair: Ms. Krutulytė (Vice-Chair) . . . . . (Lithuania)
later: Ms. Al-Thani . . . . . (Qatar)

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In the absence of Ms. Al-Thani (Qatar), Ms. Krutulytė (Lithuania), Vice-Chair, took the Chair.

The meeting was called to order at 3.05 p.m.

Agenda item 82: Report of the International Law Commission on the work of its seventy-second session (*continued*) (A/76/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VI and IX of the report of the International Law Commission on the work of its seventy-second session (A/76/10).

2. **Mr. Edbrooke** (Liechtenstein), referring to the topic "Sea-level rise in relation to international law", said that rising sea levels posed a grave threat to the lives and livelihoods of millions of people in the vast majority of Member States. The efforts made by the Commission to address the topic's ramifications for international law were befitting of its urgency.

3. Liechtenstein appreciated in particular the decision to include subtopics on the protection of persons affected by sea-level rise and on statehood in the work of the Study Group, thus reflecting the importance of a person-centred and human rights-focused approach. Sea-level rise had novel implications for the notion of statehood. Legal challenges to the persistence of a particular State had in the past arisen in situations where the State in question had lost control over its territory or population; in such cases, the challenge rested on the State's failure to fulfil the criteria set out in article 1 of the Montevideo Convention on the Rights and Duties of States, according to which a State was defined as possessing a permanent population, a defined territory and a Government. In the case of territorial inundation due to sea-level rise, however, the territory and the population residing therein had not fallen under the control of another State and it could be assumed that both the population and the Government continued to exist.

4. Given the worrying trajectory for the world set out in the most recent report of the Intergovernmental Panel on Climate Change, the peoples most immediately affected by sea-level rise must be able to rely on the presumption that international law would continue to uphold their right to self-determination, including its manifestation through statehood. In any discussion of statehood in the context of rising sea levels, it should be noted that there was in practice a strong presumption of the persistence of States, including their rights and obligations under international law, for example in situations of belligerent occupation. Such a presumption should therefore also apply in the event of total or partial inundation of the territory of a State or country, or the relocation of its population. In such a situation, the affected people should still be able to determine how to express its right to self-determination. Thus, in the case of a people that had already expressed its right to self-determination through statehood, statehood would cease only if another form of expression of the right to self-determination was explicitly sought. The international community might have a role to play in assisting relocated peoples to continue to freely determine the expression of their right to self-determination.

5. **Ms. Vaz Patto** (Portugal), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that international criminal tribunals were vital to the fight against impunity for the most serious crimes of international concern. Although the scope of the topic was limited to immunity from foreign jurisdiction, the Commission should ensure that its current work did not alter or compromise existing norms and principles of international criminal law. It must also consider the relationship between national and international courts, since international criminal courts often relied on States for the exercise of their jurisdiction, by virtue of the principles of subsidiarity and complementarity, as well as State obligations on cooperation. Portugal could support a provision on the issue in the draft articles. By stating that the draft articles were without prejudice to the rules governing the functioning of international criminal tribunals, draft article 18 as proposed by the Special Rapporteur in her eighth report (A/CN.4/739) appeared to achieve three important goals: it highlighted the independence from international criminal tribunals of the regimes applicable to immunity before national criminal courts; it safeguarded the legal framework applicable to the functioning of the international criminal tribunals; and it presented a text applicable to all States, whether or not they were parties to the Rome Statute of the International Criminal Court.

6. Portugal believed that a dispute settlement clause would be useful, regardless of the nature of the final outcome of work on the topic. Draft article 17 as proposed by the Special Rapporteur was a good starting point for the discussion, in that it established a three-phase system for dispute settlement: consultations, negotiations and recourse to arbitration or the International Court of Justice. However, Portugal reserved its position until the Commission had completed its first reading.

7. Portugal took note of the views of the Special Rapporteur and Commission members, as reflected in the Commission's report (A/76/10), on the reasoning behind the intention not to include a provision on good

practices in the draft articles. In her delegation's view, the idea of including references to examples of good practices in the general commentary deserved further discussion.

8. Turning to the topic "Sea-level rise in relation to international law", she said that her delegation was pleased that the Study Group's work would be based on the premise that sea-level rise due to climate change was a scientifically proven fact. With that phenomenon expected to have a profound impact throughout the planet, the related discussions of the Commission and the Committee were relevant and timely.

9. The first issues paper prepared by the Co-Chairs of the Study Group on sea-level rise in relation to international law (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) made an excellent contribution to the examination of the possible legal effects of sea-level rise on the status of certain maritime zones and entitlements under the United Nations Convention on the Law of the Sea. Portugal welcomed the approach taken by the Co-Chairs in mapping past and current State practice on measures for responding to sea-level rise, while also commenting on other useful elements, such as treaty and customary international law, judicial decisions of international and national courts and tribunals, and the analyses of scholars.

10. Portugal would follow with great interest the work of the Study Group on the subtopics of statehood and protection of persons affected by sea-level rise, which would be the subject of the second issues paper. It was her delegation's understanding that both the first and the second issues papers were intended to be preliminary in nature and that consolidated issues papers reflecting the work of the Study Group and the comments of Member States would subsequently be prepared. Portugal therefore reserved the right to make further comments on those consolidated issues papers.

11. Her delegation's full statement would be made available in the eStatements section of the *Journal of the United Nations*.

12. **Ms. Orosan** (Romania), referring to the topic "Immunity of State officials from foreign criminal jurisdiction" said that her delegation hoped that the Commission would complete its first reading of the draft articles in the current quinquennium. It appreciated the Special Rapporteur's decision to address, in her eighth report (A/CN.4/739), the question of the relationship between the immunity of State officials from foreign criminal jurisdiction and the obligation to cooperate with international criminal tribunals, especially when international tribunals relied on States to exercise primary jurisdiction, according to the principle of complementarity. As her delegation understood it, the aim of the "without prejudice" clause was to clarify that the draft articles neither applied to nor addressed the rules of international criminal tribunals, whose autonomy was thereby respected, and to reaffirm the scope of the topic, namely the immunity of State officials from criminal jurisdiction, and hence to safeguard both regimes. Her delegation did not interpret draft article 18 as creating a hierarchical relationship in favour of the rules governing international criminal tribunals. On the contrary, it shared the view that the absence of such a clause could be misinterpreted as altering such rules. Moreover, draft article 18 could not be seen as adding anything to the constituent treaties of international tribunals in terms of rights and obligations. The Drafting Committee should look into proposals to further refine the text, especially if they could alleviate certain concerns about the draft article.

13. With respect to draft article 17, as proposed by the Special Rapporteur in her eighth report, Romania saw value in providing for a mechanism for the peaceful settlement of disputes, as a final procedural safeguard that could help resolve a potential dispute at an early stage. Such a provision logically followed the draft articles on notification, exchange of information and consultations.

14. Romania reserved the right to make further comments on draft articles 17 and 18 once they had been considered by the Drafting Committee.

15. With regard to the draft articles provisionally adopted by the Commission at its seventy-second session, her delegation considered that the approach taken was generally correct, in line with the relevant practice on immunity of State officials. However, greater consistency was needed in the terminology used.

16. The language contained in draft article 8 ante was a fair attempt to ensure the applicability of all procedural safeguards to all circumstances in which a State official might face the exercise of criminal jurisdiction by a foreign State. Her delegation was encouraged that those safeguards included considerations pertinent to the determination of whether immunity applied or not in a specific circumstance, which was particularly relevant to the question of immunity *ratione materiae*.

17. With respect to draft article 8, her delegation believed that the question of immunity should be addressed as soon as the forum State learned that it was of relevance in the context of criminal proceedings. The authorities of the forum State should be particularly thorough in assessing the application of immunity by seeking full cooperation with the State of the official at

an early stage. Likewise, there was an obligation of diligence on the part of the State of the official to cooperate in good faith with the forum State and act in the interests of justice. Her delegation also shared the view that the question of immunity should be considered *in limine litis*, and in any case before any measure potentially affecting the immunity and/or the inviolability of the State official was taken.

18. Concerning draft article 10, Romania agreed that invocation of immunity was a right that should be exercised as early in the proceedings as possible. However, it should be clarified in paragraph 1 that the failure by a State to exercise that right as soon as it became aware that the criminal jurisdiction of another State could be or was being exercised over the official did not forfeit the State its right to invoke immunity at any time thereafter. That said, such clarification was without prejudice to the diligence that a State should demonstrate in exercising the right to invoke immunity as early as possible in the proceedings in accordance with the logic that it should act in good faith and not abuse its discretion. The same logic underpinned the obligation of the forum State to address the issue of immunity *in limine litis* and to seek the cooperation of the State of the official in clarifying its application. Such a course of action was also important for purposes of legal certainty.

19. Her delegation agreed with the wording of draft article 11 and the commentary thereto. In particular, it supported the inclusion of paragraph 5, since waiver of immunity was pointless if it could be revoked, and did not see the need to formulate any exceptions to irrevocability. All the situations referred to as possible exceptions could be dealt with under the procedural safeguards already introduced in the relevant draft articles.

20. Turning to the topic "Sea-level rise in relation to international law", she said that sea-level rise posed increasing challenges, including from the perspective of ensuring security and stability around the world, and had manifold implications for international law. Romania had therefore supported the inclusion of the topic in the Commission's programme of work and appreciated the work undertaken to date. Her delegation welcomed the balanced approach taken in the first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1), which was an important first step towards undertaking a mapping exercise of the legal questions raised by sea-level rise and interrelated issues, and found it reassuring that the Study Group had taken on board suggestions for its further work on the topic. Both the first issues paper and the Commission's discussions reflected the complex nature of the subject and the need for a comprehensive approach; the complexity of the topic was also seen in the possible relevance of other sources of international law, including customary international law and rules of treaty law. Her delegation welcomed the Study Group's intention to give priority to examining sources of international law, principles and rules of international law, practice and *opinio juris*, and navigational charts.

21. Romania had provided the Commission with information on its national legislation and treaty practice, but it related only indirectly to the topic. Its legislation could be interpreted as favouring an ambulatory system of baselines, although a connection with the specific case of sea-level rise was difficult to make, given that the Black Sea was a semi-enclosed sea and therefore less exposed to that phenomenon. Her delegation looked forward to the ongoing work of the Study Group and was pleased that national legislation on baselines would continue to be analysed.

22. Romania reiterated its attachment to the integrity of the United Nations Convention on the Law of the Sea and its understanding that the outcome of the Commission's work on the topic should not lead to any modifications thereto. It looked forward to the second issues paper on issues related to statehood and the protection of persons affected by sea-level rise.

23. Her delegation had nominated Bogdan Aurescu, one of the Co-Chairs of the Study Group on sea-level rise in relation to international law, for re-election as a member of the Commission for the next quinquennium and trusted that he would receive the support of Member States.

24. **Mr. Bandeira Galindo** (Brazil), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction" and referring to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), said that his delegation concurred with the Commission's approach of limiting the scope of the project to immunity from foreign criminal jurisdiction in domestic courts, such that it would not affect the jurisdiction of international tribunals. For Brazil, the immunity of State officials from foreign criminal jurisdiction was important to ensure that they could adequately perform their functions, particularly when they were not protected by existing multilateral conventions. The jurisdiction of international criminal tribunals had a different legal basis, which was linked to the objective of avoiding impunity for the most serious crimes and to the principle of complementarity. His delegation agreed with the Special Rapporteur that the discussion of immunity of State officials from foreign criminal jurisdiction should not proceed without regard to the existence of international criminal tribunals. The

"without prejudice" clause in draft article 18 could provide a practical solution to the matter, since it maintained the independence of both regimes applicable to immunity, while recognizing that they might overlap. Draft article 18 should be read not as creating a hierarchical relationship between different legal frameworks but as recognizing that the treatment of immunity under specialized treaty regimes might be different from that provided under customary international law in respect of national jurisdictions.

25. Further discussion was needed on draft article 17 since it was not clear at the current stage whether a dispute settlement clause would be appropriate or desirable in the outcome of the Commission's work. If included, it should be general in nature, without compulsory language.

26. Turning to the topic "Sea-level rise in relation to international law", he said that, for Brazil, as a country with a coastline of almost 8,000 km and a coastal population of over 50 million persons, it was important to enhance understanding of the legal impact of sea-level rise, which posed an existential threat to some States and could have legal implications for existing maritime zones and borders. It could also threaten the livelihoods of communities and affect human mobility. Thus, legal certainty in that area would be key to preventing disputes between Member States. Solutions to the complex problems arising from the topic should be in accordance with the United Nations Convention on the Law of the Sea. His delegation thanked the Study Group for its first issues paper and looked forward to its future work on issues related to statehood and the protection of persons affected by sea-level rise.

27. *Ms. Al-Thani (Qatar) took the Chair.*

28. **Ms. Carral Castelo** (Cuba), referring to the topic "Immunity of State officials from foreign criminal jurisdiction" said that her delegation commended the Commission for its work in elaborating the draft articles, with a view to a possible future treaty, and urged it to maintain consistency with its work on other related topics, such as crimes against humanity and peremptory norms of international law (*jus cogens*).

29. With regard to the procedural aspects of the topic, her delegation drew attention to the importance of balancing key principles such as respect for the sovereign equality of States, the need to combat impunity for international crimes and the protection of State officials from the politically motivated or abusive exercise of criminal jurisdiction. In doing so, the domestic law of States, which determined the application and scope of immunity, must be taken into account. It was also essential to uphold the principle that any intention to exercise jurisdiction over a foreign citizen who enjoyed immunity must be communicated in advance. The duty to notify should be seen as the first guarantee for a State to safeguard its interests by invoking or waiving such immunity.

30. Cuba endorsed the view that neither the principle of universal jurisdiction nor the obligation to extradite or prosecute officials enjoying immunity should be applied. Furthermore, the regime established in international conventions with an impact on immunity, in particular the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, must not be altered. Lastly, it was important to strike the right balance between respect for international law and adequate procedural guarantees.

31. As to the topic "Sea-level rise in relation to international law", Cuba was aware that the United Nations Convention on the Law of the Sea did not have an answer to the questions raised by the topic. Nevertheless, it was essential to ensure unconditional compliance with the provisions of the Convention concerning maritime limits and boundaries, even when the latter underwent physical changes owing to sea-level rise.

32. Great caution was needed in considering the possible loss of statehood in relation to sea-level rise. It was vital to uphold the principle that, in the event that a small island State were to lose its territory as a result of sea-level rise, it would not lose its status as an international subject, with all the attributes thereof. International cooperation would play an essential role in that regard.

33. Cuba stood ready to share its experience in protecting persons who lived in coastal areas from the impact of extreme climate phenomena similar to sea-level rise. By means of *Tarea Vida*, the State plan to address climate change, her Government had made provision for the relocation of 41,000 persons living in endangered coastal areas.

34. **Mr. Klanduch** (Slovakia), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that Slovakia welcomed the logical flow of the draft provisions addressing procedural aspects of immunity in draft articles 8 ante, 8, 9, 10, 11 and 12, as provisionally adopted by the Commission at its seventy-second session. His delegation shared the view that the forum State must assess the question of immunity in each individual case without delay. State authorities should proceed with the examination proprio motu, in particular when immunity *ratione personae* was involved and the invocation by the State of which the official was a representative was not itself a

necessary prerequisite for immunity to be applied. With regard to draft article 8, Slovakia welcomed the further elaboration of the phrase "coercive measures that may affect an official of another State" in the commentary thereto, including with respect to the inviolability that an official might enjoy under international law. It also noted with appreciation that draft article 11 provided for the irrevocability of waivers.

35. Turning to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), he said that the jurisdiction of international criminal courts should not be overlooked when addressing immunity in the general context of combating impunity. However, international criminal jurisdiction was clearly outside the scope of the topic, since it always stemmed from a specific treaty rather than from general international law. The "without prejudice" clause proposed in draft article 18 was therefore appropriate, though Slovakia would prefer for it to be included in draft article 1, on scope.

36. His delegation had difficulty seeing the added value of draft article 17 if it did not contain a jurisdictional clause, in case the draft articles were to become a treaty. In his delegation's view, the provision was redundant, in view of the general obligation for States to settle disputes by peaceful means, and it was also restrictive, as it enumerated only some peaceful means.

37. Slovakia continued to express caution with regard to the list of crimes included in draft article 7, provisionally adopted at the Commission's sixty-ninth session, and the annexed list of international treaties referred to in paragraph 2 thereof.

38. Turning to the topic "Sea-level rise in relation to international law", he said that the great importance of the topic to many States might lead to a preference for certain elements of progressive development. In his delegation's view, the Study Group should base its work on the practice of States and relevant international and regional organizations. Any outcome must reaffirm the universal nature of the United Nations Convention on the Law of the Sea and the need to preserve its integrity, as well as the importance of the principles incorporated therein, including the question of the balance of rights and obligations between coastal States and other States.

39. **Mr. Kawase** (Japan), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that the Commission's work on procedural provisions and safeguards took sufficient account of the rights of the State of the official and might contribute to clarifying the procedural aspects of rules on immunity. It was unclear, however, whether the Commission had thoroughly analysed State practice in preparing draft articles on the obligation of the forum State. It would be useful if the Commission could explain in detail its rationale in that regard. His delegation was pleased that the Commission, in its report (A/76/10), had addressed the need to analyse the relationship between inviolability and immunity of officials.

40. The divergent views among members of the Commission regarding crimes in respect of which immunity *ratione materiae* did not apply, as set out in draft article 7 as provisionally adopted by the Commission at its sixty-ninth session, had affected the entire discussion on the topic, including the elaboration of draft article 8 ante. Japan expected that the issue would be resolved and that the Commission would provide Member States with a persuasive explanation concerning draft article 7.

41. With regard to the topic "Sea-level rise in relation to international law", Japan was fully aware of the pressing nature of the issue, especially for small island States and low-lying coastal States. As recognized in the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, adopted by the Pacific Islands Forum in August 2021, climate change-related sea-level rise imperilled the livelihoods and well-being of peoples, particularly in island countries, and undermined the realization of a peaceful, secure and sustainable future. Given the urgency, Japan looked to the Study Group to continue its discussion of the issues identified as areas for further in-depth analysis on a priority basis. It was committed to working closely on the issue with the countries concerned, including the members of the Pacific Islands Forum.

42. It was encouraging that a number of countries were in agreement regarding the primacy of the United Nations Convention on the Law of the Sea in tackling climate change-related sea-level rise. The Declaration of the Pacific Islands Forum was also in line with that understanding. Regardless of the results of the discussions, maritime zones must be established in accordance with the relevant provisions of the Convention and, in addressing the issues of sea-level rise in the context of the law of the sea, the delicate balance of rights and obligations stipulated in the Convention must be borne in mind.

43. **Ms. Jiménez Alegría** (Mexico), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that in view of the persistent tensions between States on related matters, clear rules would help to prevent abuse and would make possible the development of peaceful international relations based on respect and reciprocity.

44. Mexico agreed that any question of immunity before international criminal tribunals was outside the scope of the topic. The domestic justice of States and international criminal justice were two different spheres, and, although they overlapped in certain respects, clear rules were needed to ensure the best functioning of both bodies of law.

45. With regard to the discussions concerning dispute settlement clauses, the existence of a mechanism that provided for consultations, negotiations and judicial or arbitral settlement might be of considerable utility, allowing States to resort to established peaceful methods in the event of disputes arising from violations of the immunity of State officials. Throughout the Commission's work on the topic, it had been clear that States interpreted immunity from criminal jurisdiction in different ways. The Commission should therefore continue to explore mechanisms that would allow clear rules to be established while respecting, as far as possible, the sovereignty and legal system of each State.

46. As was well established in practice, immunity from criminal jurisdiction for officials other than Heads of State and Government and Ministers for Foreign Affairs should cover only those acts carried out in an official capacity. The purpose of the draft articles was not to promote the impunity of State officials, but to prevent abuse or persecution by other countries.

47. In light of the Commission's debate on the topic, Mexico stressed that the consideration of procedural safeguards could not serve as a pretext for reopening articles already provisionally adopted by the Commission, including draft article 8. In any case, it would be up to the Sixth Committee to review the full set of draft articles.

48. With regard to the topic "Sea-level rise in relation to international law", her delegation welcomed the Commission's decision to examine the international law implications of sea-level rise, which was closely linked to global warming. In addition to the actions in response to climate change that all States must take in the framework of international cooperation, it was vital to discuss how the phenomenon affected the rights and obligations of States with regard to their territory and the law of the sea. The questions to be addressed by the Study Group were highly technical but had a major impact on the international legal order; the status of islands, rocks and low tide elevations, the effects of the ambulation of baselines and the shifting of maritime zones could have consequences for the sovereign and economic rights of States in a number of areas.

49. In considering the topic, it was essential to address the practice of coastal States, which were the ones most vulnerable to sea-level rise. Mexico welcomed the Commission's decision to extend its study of State practice and *opinio juris* to various regions, including Latin America, to take into account the application of existing principles and rules of international law, and to call on relevant scientific and technical experts. That would result in a more robust study, regardless of its final form.

50. Her delegation called on all States, in particular developing countries, to submit their comments to the Commission in a timely manner. That would help ensure that the study did not exclusively reflect the view of the so-called "global north", but incorporated the needs and concerns of the international community as a whole.

51. **Mr. Devillaine** (Chile), referring to the topic "Sea-level rise in relation to international law", which was of particular significance to Chile, given its more than 5,000 km of coastline, said that, even if greenhouse gas emissions were drastically reduced and sea levels rose by less than that predicted under current scenarios, the indirect effects of sea-level rise would still be serious, endangering the lives and human rights of hundreds of millions of people and posing a number of important questions for international law. Thus, the Commission's contribution to the topic, and the work of the Study Group, was of the utmost importance. It was essential to safeguard the persons affected and their rights by developing practicable solutions in order to respond to the factual consequences of sea-level rise under international law.

52. The international law of the sea, codified in the United Nations Convention on the Law of the Sea and crystallized as customary international law, was central to the Study Group's work. A key focus of the first issues paper had been the interpretation of the relevant provisions of the Convention in the light of sea-level rise. Bearing in mind the serious effects of sea-level rise in the real world and the legal implications of the inundation of low-lying coastal zones and islands for baselines, the maritime zones that extended therefrom and their delimitation, his delegation believed that the best approach for interpreting the Convention was to give priority to the principles of international stability and the peaceful coexistence of States. Similarly, the principle of equity had a role to play in some of the issues to be addressed by the Study Group, and its interpretation must therefore be in compliance with established rules of international law, in particular articles 31 and 32 of the Vienna Convention on the Law of Treaties.

53. Chile agreed that the concerns expressed by States potentially affected by sea-level rise were legitimate and

that there was a need to approach the topic in full appreciation of its urgency, as noted in the Commission's report (A/76/10, para. 263). Chile endorsed the view that sea-level rise was not a new or unforeseen phenomenon and would not constitute a fundamental change in circumstances pursuant to article 62 of the Vienna Convention. That article was fully applicable to both land and maritime boundaries, which to all intents and purposes must be considered inalterable.

54. With reference to chapter III of the first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1), on scientific findings and prospects of sea-level rise and relationship with the topic, his delegation understood that, in its consideration of the topic, the Commission would address those scientifically proven factual issues that it had expressly determined to be part of its mandate. It was those issues, and not others, that should be examined with a view to determining their legal effects.

55. Chile concurred with the observation in paragraph 264 of the Commission's report regarding the challenge of seeking solutions to complex legal and technical issues without losing sight of their human dimension, as well as their consequences from the point of view of the law of the sea. It also agreed about the need for stability, security, certainty and predictability, as referred to in paragraph 266 of the report, it being understood that, as expressed by the delegations of States affected by sea-level rise, "legal stability" meant the need to preserve the baselines and outer limits of maritime zones. In an ambulatory baseline scenario, the immediate effect would be a loss of sovereignty and jurisdictional rights for coastal and island States and a corresponding reduction in their maritime zones. His delegation agreed that the outcome of the Commission's work on the topic should not interfere with or amend the United Nations Convention on the Law of the Sea.

56. Chile endorsed the proposal made in 2018 by the Committee on International Law and Sea Level Rise – as referred to in paragraph 269 of the Commission's report – that, if the baselines and the outer limits of maritime zones of a coastal or an archipelagic State had been properly determined in accordance with the United Nations Convention on the Law of the Sea, they should not be required to be recalculated should sea-level changes affect the geographical reality of the coastline. It also endorsed the view that baselines were not established by charts or lists, but by the detailed rules set out in the Convention and other relevant sources.

57. Sea-level rise posed an urgent challenge to which the Commission must respond through the codification and progressive development of international law, addressing all relevant issues, including the impact on territorial integrity and international peace and security. It was important to take account of the impact that loss of territorial integrity could have, inter alia, on statehood, inter-State disputes, access to resources, nationality and the status of refugees. In that connection, his delegation stressed the importance of the Study Group's future work in seeking to broaden its analysis of State practice and *opinio juris* with regard to baselines and in examining whether such practice was relevant for international law or whether it was pertinent to treaty interpretation, so as to be able to determine what was customary international law and, in the case of limits established in treaties, how they should be interpreted.

58. Chile stressed the importance of the comments made by Claudio Grossman in the Study Group's work. His re-election as a member of the Commission would ensure the continuity needed for the work on the topic and Chile urged other States to support his candidacy.

59. **Ms. Schneider Rittener** (Switzerland) said, with respect to the topic "Immunity of State officials from foreign criminal jurisdiction", that the Commission's work was helping to ensure a balance between the fight against impunity and the principle of the sovereign equality of States. Inter-State relations must be stable and predictable, and officials acting on behalf of their State must be independent vis-à-vis other States. However, State officials who committed crimes, in particular violations of human rights or international humanitarian law, must be held accountable.

60. Her delegation took note of the six new draft articles on procedural aspects of immunity provisionally adopted by the Commission. It noted that, pursuant to draft article 9, the forum State must notify the State of the official before initiating criminal proceedings or taking coercive measures, the purpose being to enable the State of the official to safeguard its interests by invoking or waiving the immunity of its official. Although Switzerland recognized the importance of notification in the general framework of procedural guarantees, prior notification could have undesirable effects on the forum State's exercise of criminal jurisdiction. The Commission should clarify those undesirable effects and assess whether they could be mitigated if notification was provided "promptly", as provided in article 42 of the Vienna Convention on Consular Relations. It should also provide a more detailed definition of the acts that would entail such a duty to notify.

61. With regard to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), Switzerland was pleased that a "without prejudice" clause had been included in draft article 18, concerning the relationship between the immunity from foreign criminal jurisdiction of State officials and international criminal tribunals. It welcomed the recognition of specific rules governing the functioning of international criminal tribunals and the obligations of States stemming therefrom. However, it would prefer a formulation that referred to "internationalized criminal tribunals" rather than "international tribunals", so as also to include hybrid tribunals.

62. Her delegation hoped that the Commission would soon be able to clarify all outstanding points and provisionally adopt the draft articles on first reading.

63. **Ms. Silek** (Hungary), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that the complex relationship between international crimes and sovereign immunity posed a great challenge to the international legal order. It was important to strike a balance between the sovereign equality of States and the interest of the international community in preventing and punishing the most serious crimes under international law. The fundamental principle of sovereignty in international law meant that the courts of one State must not have jurisdiction over the acts of another State. Hungary therefore welcomed the Commission's provisional adoption of draft article 10, which set out the procedural requirements for the invocation of immunity.

64. With respect to draft article 11, also provisionally adopted by the Commission, her delegation believed that waiver of immunity was a right, not an obligation, of the State of the official. As the holder of that right, a State could give consent to the exercise by another State of criminal jurisdiction over one of its officials. Hungary welcomed paragraph 5, pursuant to which waiver of immunity was irrevocable. In her delegation's view, that paragraph was in line with the general rules of immunity and supported legal certainty.

65. Hungary supported draft article 17, as proposed by the Special Rapporteur in her eighth report (A/CN.4/739), which was aimed at creating an effective dispute settlement system. That model, while subject to the general rules on dispute settlement in force in contemporary international law, would give States a useful instrument to protect their rights and interests. Hungary welcomed the reference to the International Court of Justice as a potential dispute settlement forum. It also agreed with the inclusion of a specific time period for negotiation. However, with regard to cases where it became apparent within the specified 6- or 12-month period that negotiations would yield no results, further clarification might be necessary as to whether States could turn to judicial or arbitral settlement before the end of that period. Her delegation noted with appreciation that the Special Rapporteur had provided in the proposed draft article for optional recourse to judicial or arbitral settlement. While Hungary was a firm believer in judicial and arbitral dispute settlement, it considered that making recourse optional rather than obligatory might have a more encouraging effect for States.

66. Her delegation was of the view that the complex nature of immunity should not diminish the protection of the fundamental interests of the international community. Rules on immunity should not be considered in isolation, but in interaction with other norms of international law.

67. On the topic "Sea-level rise in relation to international law", her delegation stressed the importance of adaptation to the harmful and, in most cases, irreversible effects of climate change. The rate of sea-level rise depended to a large extent on policy choices, including prompt mitigation, the adoption of robust resilience-focused policies and the establishment of a supportive legal framework. A slower rate of sea-level rise might allow for better adaptation outcomes and help with the avoidance or mitigation of other human crises such as forced migration, human displacement, and both economic and non-economic losses. Hungary therefore welcomed the first issues paper (A/CN.4/740 and A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) on the implications of sea-level rise for the law of the sea and expressed support for the elaboration of the second paper, on statehood and protection of persons.

68. As a landlocked country, Hungary was not in a position to provide examples of State practice. However, it reiterated its view that sea-level rise was a crucial problem not only for States directly affected by it, but for the entire international community. All countries were or would be affected by its primary or secondary effects. Sea-level rise raised questions relating not only to the law of the sea, but also to statehood, the rights of persons primarily affected by sea-level rise, and the rights and obligations of States suffering secondary effects. It was therefore of the utmost importance that due attention be paid to the issue.

69. **Mr. Eick** (Germany) said that the importance of the topic "Immunity of State officials from foreign criminal jurisdiction" could not be overstated. The

commitment to the fight against impunity, especially for the most serious crimes under international law, continued to be one of the most significant tenets of German justice and foreign policy. Germany was committed to the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the Commission in 1950, including, in particular, the core concept set out in Principle III that "the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law." The investigation and prosecution of crimes under international law by domestic prosecutors and courts under certain conditions was an indispensable element of the international criminal justice architecture and, in part, an obligation under international law. Germany had espoused that notion with the adoption of the German Code of Crimes against International Law of 2002, which provided a basis for the prosecution of certain crimes under international law, inter alia on the basis of universal jurisdiction. Based on that law, German prosecutors and courts made an important contribution to the investigation and prosecution of such crimes.

70. At the same time, immunity, including that of State officials from foreign criminal jurisdiction, was a key element in protecting the international legal system based on the principle of the sovereign equality of States. It constituted a functional basis of stable and peaceful inter-State relations. The Commission's work on the topic played an important role in further clarifying how States could balance the need for effective criminal proceedings against the need for stability in international relations, taking also into account the procedural provisions and safeguards regarding immunity. In view of the sensitivity of balancing those potentially competing interests, and the ongoing controversy surrounding the topic, Germany reiterated its view that it was essential for the Commission to indicate which provisions related to *lex lata* and which represented the progressive development of international law, and to consider whether the respective status of each draft article, or even each subsection thereof, was highlighted in the commentaries. Transparency on that issue would greatly benefit the final version of the draft articles and facilitate their broad acceptance. Any proposed substantial change of international law would need to be agreed on by States in the context of a treaty.

71. During the finalization phase of the project, the Commission should continue to scrupulously examine State practice, including any court decisions and proceedings regarding both exceptions to immunity *ratione materiae* and procedural safeguards, and also possible statements by Governments. The controversial discussions in the Commission and the Committee on draft article 7, provisionally adopted by the Commission, appeared to have triggered a wider debate and exposed a degree of uncertainty on the application and precise scope of immunity *ratione materiae*. Any reactions to those discussions, in State practice or communicated *opinio juris*, should be taken into account to the extent possible.

72. Germany also continued to follow the Commission's work closely because of recent important developments in German jurisprudence on immunity of State officials. On 28 January 2021, the German Federal Court of Justice had ruled on an appeal involving the prior conviction of a former first lieutenant of the Afghan armed forces for war crimes, based on the German Code of Crimes against International Law. In essence, the Court had found that, according to customary international law, criminal prosecution by a domestic court for certain war crimes was not barred by functional immunity if the acts were committed abroad by a foreign State official of subordinate rank in the exercise of his or her sovereign functions. While the judgment formally addressed the issue of immunity only in the context of certain war crimes, the ruling had been interpreted as providing a basis for German courts to find immunity *ratione materiae* to be inapplicable in cases involving other crimes under customary international law, namely crimes against humanity, genocide and the crime of aggression, all of which were punishable under the Code.

73. The Court had also decided that it was not under an obligation to refer the matter to the Federal Constitutional Court, which was required to render a decision if, in the course of litigation, there were doubts as to whether a general rule of international law was an integral part of federal law. For the time being, therefore, the judgment of the Federal Court of Justice was the highest judicial decision in Germany on the issue of immunity of State officials from foreign criminal jurisdiction. For Germany, it constituted important State practice and would also have a significant bearing on his Government's position on the topic under consideration.

74. Germany stressed the importance of clearly differentiating between the various types of immunity under international law and the different situations in which immunity under international law might be raised. The need for such clear differentiation was well established in international case law and had also been referred to in the ruling of the German Federal Court of

Justice on 28 January 2021. The draft articles on the immunity of State officials from foreign criminal jurisdiction, and the concomitant debates and statements, should in general not be interpreted as having implications for other forms of immunity, such as those of States in civil proceedings.

75. With regard to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), his delegation agreed that a clear distinction should be made between the topic and the rules governing the functioning of international criminal courts and tribunals. The topic appeared not to be the right context for elaborating in a general fashion on the highly complex interplay of domestic and international criminal justice and prosecutorial systems in situations of cooperation. Any impression that the draft articles could carry legal implications for the rules governing the operations of international criminal courts and tribunals should be avoided. On the whole, Germany regarded a "without prejudice" clause as a good means to counteract such an impression. Such a clause would add to the clarity and transparency of the draft articles, and his delegation looked forward to the Drafting Committee's conclusions with regard to its exact formulation. It also shared the view that the words "international criminal tribunals" in the proposed draft article 18 should be further explained, defined or broadened so as to encompass other criminal justice bodies partly rooted in international law, such as hybrid tribunals.

76. Germany noted with interest the inclusion in the draft articles of provisions on a dispute settlement mechanism. The proposed draft article 17 seemed to give rise to a number of fundamental systematic and practical questions. In many States, including Germany, it was for the courts of the forum State that were competent to exercise jurisdiction to determine the immunity of State officials from foreign criminal jurisdiction. That had also been the approach taken in the original draft article 9 on the determination of immunity, as proposed by the Special Rapporteur in her seventh report (A/CN.4/729), which remained under review in the Drafting Committee as draft article 13. Following that principle, the possibility of either the forum State or the State of the official referring an inter-State dispute to arbitration or to the International Court of Justice, as proposed in draft article 17, paragraph 2, a matter which would typically be decided by the respective Governments, might call the independence of the domestic courts into question. Such independence might also be affected by the obligation to suspend domestic proceedings pending inter-State dispute settlement, as provided in draft article 17, paragraph 3. That not only raised difficult questions regarding the separation of powers but might also have unintended implications for the effective investigation and prosecution of crimes in cases in which immunity did not apply. A dispute settlement mechanism that would jeopardize legitimate efforts and measures to conduct criminal prosecutions in such cases was unacceptable. Under no circumstances should the fight against impunity be undermined.

77. As to the draft articles and commentary thereto on procedural rules and safeguards, as provisionally adopted by the Commission, Germany approved of the finalized draft article 8 ante (Application of Part Four), which clarified the scope of application of procedural provisions and safeguards, added considerably to the certainty of the draft articles and facilitated their understanding. In that regard, his delegation referred to the comments made in its statement before the Committee at the seventy-fourth session of the General Assembly (A/C.6/74/SR.30) and reserved the right to comment on the full set of procedural provisions and safeguards once they had been provisionally adopted by the Commission.

78. Turning to the topic "Sea-level rise in relation to international law", he said that Germany was following the Commission's work with great interest. Sea-level rise would impact all coastal States, including those with coastal megacities and unstable coastlines, and all other States owing to the significant implications for stable international relations, economic prosperity and the enjoyment of human rights. Small island States and States with low-lying coastal areas or large river deltas would be disproportionately affected. As a coastal State itself, Germany would be directly affected by sea-level rise, as had recently been recognized by the Federal Constitutional Court in its landmark decision of 24 March 2021 on the Federal Climate Change Act. According to reports referred to by the Court in its summary of background facts, sea levels had risen by some 20 cm in the German Bight and 14 cm on the German Baltic coast over the last 100 years. The Court had also mentioned that higher sea levels could increase storms in the North Sea and Baltic Sea and would leave German coastal regions at greater risk of flooding.

79. All States must cooperate to address long-term sea-level rise using the mechanisms, rules and institutions that the multilateral system offered. The Commission's work on the topic had a pivotal function in clarifying the role that international law played and could play in guiding States' response to sea-level rise.

80. The first issues paper prepared by the Co-Chairs of the Study Group on sea-level rise in relation to

international law (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) raised important questions about the preservation of baselines and maritime zones. Germany appreciated the fact that, based on the syllabus set out in annex B to the report of the Commission on the work of its seventieth session (A/73/10), the implications of sea-level rise for the law of the sea had been examined with due regard for the integrity of the United Nations Convention on the Law of the Sea. Germany was committed to working with other States to preserve their maritime zones and the rights and entitlements that flowed from them in a manner consistent with the Convention, including through a contemporary reading and interpretation of its intention and purpose, rather than through the development of new customary rules.

81. Germany looked forward to the second issues paper, on statehood and the protection of persons affected by sea-level rise, the latter question being of particular urgency. As the Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees did not apply to so-called "climate refugees", it might be helpful to further clarify possible human rights-based non-refoulement obligations of States, drawing also on the views adopted by the Human Rights Committee in a case against New Zealand concerning a Kiribati national's deportation to his home country.

82. Germany urged the Commission to make a clear distinction between *de lege lata* findings and suggestions for the progressive development of international law. It had raised that concern in relation to many topics on the Commission's agenda and deemed it to be of particular importance in the context of the topic under consideration, as it involved a mapping exercise of very different legal issues across a variety of legal fields as well as new questions, in respect of which relevant State practice and *opinio juris* appeared to be rather scarce.

83. **Ms. Nguyen** Quyen Thi Hong (Viet Nam), referring to the topic "Sea-level rise in relation to international law", said that rising sea levels were placing hundreds of millions of people in small island developing States and low-lying coastal areas at risk of inundation. The work of the Study Group would contribute to promoting an understanding of the multifaceted implications of sea-level rise, which would be crucial in enabling the international community to formulate a comprehensive response that would guarantee the rights and entitlements of affected countries. The implications of sea-level rise should be addressed in such a way as to ensure stability and security in international relations, including legal stability, security, certainty and predictability, without involving any question of amending or supplementing the United Nations Convention on the Law of the Sea.

84. Viet Nam was one of the countries most affected by climate change and the risk of sea-level rise. On 21 October 2021, it had convened an Arria-formula meeting of the Security Council with 20 other Member States to exchange views and promote understanding of the security implications of sea-level rise.

85. Her delegation supported the future programme of work of the Study Group and encouraged it to further explore State practice, including the practice of small island developing States in the Pacific.

86. **Mr. Zukal** (Czechia), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction" and referring to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), said that draft article 18 merely restated the obvious fact that the draft articles did not apply to the autonomous regimes of international criminal tribunals, which were established by special instruments with their own rules and scope of application. The inclusion of that provision did not imply that the jurisdiction of international tribunals had precedence; nor could it create any new obligations or exemptions to immunity for States which were not bound by such instruments. The provision could therefore be included as another "without prejudice" clause.

87. Concerning draft article 17, his delegation did not support the suggestion that a mechanism for the settlement of disputes between the forum State and the State of the official be included in the draft articles. As pointed out by the Special Rapporteur and a number of other Commission members, such an inclusion would be relevant only if the draft articles were intended to become a treaty, which, in his delegation's view, would not be an appropriate outcome of the work on the topic. Any such provision, if retained, could only serve as non-binding guidance for dispute settlement.

88. On the provisionally adopted draft articles concerning procedural guarantees, his delegation noted that, since both immunity *ratione personae* and immunity *ratione materiae* existed in international law, the competent national authorities involved in criminal proceedings should, *proprio motu*, take into consideration any applicable immunity on the basis of available evidence. Moreover, the question of immunity must be examined at an early stage of proceedings, *in limine litis*, as soon as the authorities of the forum State became aware that a foreign official might be affected by the exercise of its criminal jurisdiction.

89. Immunity *ratione personae* became relevant as soon as a foreign State official was affected by the exercise of the criminal jurisdiction of another State, whereas immunity *ratione materiae* applied only when acts of the foreign official performed in his or her official capacity became the subject matter of proceedings before foreign courts. Thus, it was likely that, in the vast majority of cases, foreign State officials enjoying immunity *ratione materiae* would be fully subject to the criminal jurisdiction of foreign States without any immunity being applicable. However, the draft articles under Part Four seemed to focus mainly on the exercise of foreign jurisdiction over officials covered by immunity *ratione personae*. His delegation therefore suggested that the text take into account possible differences between the procedural steps that might be relevant for the regime of immunity *ratione personae*, on the one hand, and for the regime of the immunity *ratione materiae*, on the other.

90. With regard to draft articles 9 (Notification of the State of the official), 10 (Invocation of immunity) and 12 (Requests for information), his delegation was not convinced that the Commission had taken sufficient account of State practice, including national laws on criminal procedure and different applicable treaties for international cooperation and mutual legal assistance. Such laws and treaties formed the basis for communication and cooperation between States in those cases. It would be inappropriate for the Commission to formulate new, binding procedural obligations. The draft procedural provisions should be regarded only as potential recommendations for States. They should also be more focused on the application of the rules of criminal procedure contained in national laws and relevant international treaties.

91. Noting that the commentary to draft article 11 dealt with the possibility that a waiver of immunity might be deduced from obligations imposed on States by treaty provisions, Czechia reiterated its position that international treaties on the prevention and punishment of serious crimes implied that immunity *ratione materiae* was not applicable in relation to such crimes in proceedings before foreign courts. That conclusion was not a result of an implied waiver, as suggested in the Commission's commentary, but a consequence of the normative incompatibility of immunity *ratione materiae* with the express definitions and obligations provided for in those treaties. At the same time, immunity *ratione personae* remained untouched and applicable before foreign courts even in cases where jurisdiction was exercised under those treaties.

92. Concerning the topic "Sea-level rise in relation to international law", his delegation underscored that the international community faced numerous complex challenges resulting from climate change, which had led to sea-level rise and subsequent coastal changes. In order to contribute to legal stability, certainty and predictability in addressing those challenges, it was of paramount importance that the work of the Commission and the Study Group should be conducted in strict adherence to the existing legal regime of the law of the sea, in particular, the United Nations Convention on the Law of the Sea. Due account should also be taken of the practice of the broadest possible number of coastal States. Czechia therefore noted with appreciation that several coastal States had responded to the Commission's invitation to provide information on their practice and had submitted written comments. It hoped that other coastal States would follow suit.

93. **Ms. Langerholc** (Slovenia), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that her delegation welcomed the progress achieved to date and encouraged the Commission to intensify its efforts to achieve further meaningful progress. The topic required careful examination, taking into account State practice, *opinio juris* and trends in international law. It touched on the principles of the sovereign equality of States and should also be addressed against the background of efforts to combat impunity, ensure accountability and provide justice for the victims, especially in connection with crimes that concerned the international community as a whole. Slovenia was convinced that further work on the topic could contribute to the progressive development and codification of international law. It acknowledged the importance of safeguarding the independence of regimes applicable to immunity and preserving the special norms on the functioning of international criminal tribunals, and it agreed that immunity before international criminal tribunals fell outside the scope of the topic.

94. The three-phased system for the settlement of disputes, combining mechanisms of a mandatory and voluntary nature, served to indicate which were the primary tools for dispute settlement. While other means were also available, predetermined mechanisms could facilitate timelier dispute settlement. Her delegation agreed that the creation of a specialized body would not be practical or helpful.

95. Slovenia welcomed the Special Rapporteur's intention to include in the commentary a reference to examples of good practices that could help resolve practical problems arising in the process of determining and applying immunity.

96. On the topic "Sea-level rise in relation to international law", her delegation stressed that sea-level rise was inevitable, its effects were imminent and it concerned not only small island developing States but also other coastal States, especially those with low-lying coasts. It posed serious challenges in the fields of human rights, territorial sovereignty and migration and created legal dilemmas, including in relation to the United Nations Convention on the Law of the Sea.

97. The first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) showed the wide range of legal issues raised by sea-level rise, which affected baselines, maritime zones, maritime delimitations and islands, as well as the exercise of sovereign rights and questions of jurisdiction. A multifaceted, in-depth approach and new solutions were needed, with legal certainty and predictability remaining a primary consideration. Her delegation trusted that the Commission's work would shed light on potential solutions and offer guidance for future action.

98. **Mr. Hawke** (New Zealand), addressing the topic "Immunity of State officials from foreign criminal jurisdiction", said that, with regard to draft article 7 provisionally adopted by the Commission at its sixty-ninth session, his delegation agreed that immunity *ratione materiae* of State officials from foreign criminal jurisdiction did not apply in respect of the most serious crimes under international law. However, it noted the diverse views among States and Commission members and believed that the issue might benefit from further consideration by the Commission.

99. His delegation welcomed the attention given in the Special Rapporteur's eighth report (A/CN.4/739) to the interaction between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, in a manner that recognized their separate and independent regimes. An appropriate "without prejudice" clause should assist in ensuring that the draft articles on the topic did not undermine the progress made in international criminal law.

100. While draft articles 8 to 12, as provisionally adopted by the Commission at its seventy-second session, articulated expectations concerning the process to be followed when a State was considering the exercise of criminal jurisdiction over an official of another State, the Commission's work might benefit from further analysis of State practice and dialogue with States. For example, New Zealand was of the view that the State of the official did not need to be notified when a criminal investigation was undertaken, but only when proceedings were formally initiated or coercive measures taken.

101. The involvement of the State of the official in the process was appropriate, given that immunity was for the benefit of the State, not the individual, and the right to take decisions in relation to immunity lay with the State. However, New Zealand noted that the forum State was required by international law to respect immunity when it applied, regardless of whether the State of the official had formally invoked it, for example through the process outlined in draft article 10. His delegation believed that the information-sharing envisaged in draft article 12 would assist with the determination of whether immunity applied, and it looked forward to the Commission's consideration of a further draft article on determination of immunity in forthcoming sessions.

102. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation reiterated the written and oral comments that it had made on the topic at the seventy-fifth session of the General Assembly, including its comments on the first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1). It commended the Commission for tackling that important issue, which reflected the critical needs of States and the pressing concerns of the international community as a whole, given the likely impact of sea-level rise on low-lying islands and coastal communities. It welcomed the manner in which the Commission had been conducting its work and considered that the Study Group's approach was very apt for the complex and interconnected nature of the topic. It endorsed the four areas identified in the Commission's report (A/76/10, para. 294) as issues for further in-depth analysis.

103. It was important for States to continue to discuss the issue of sea-level rise and maritime zones in parallel with the Commission's work. The twenty-first meeting of the United Nations open-ended informal consultative process on oceans and the law of the sea, held in June 2021, was a good example of such discussion. The Commission could provide valuable assistance to States through an in-depth legal analysis of existing law and the principles underlying it. However, his delegation was not persuaded that sea-level rise was an issue on which draft articles should be developed, as suggested in paragraph 286 of the Commission's report.

104. The impact of sea-level rise on maritime zones was a priority issue for New Zealand and its Pacific partners. Maritime zones and the associated rights to resources were essential to the Pacific countries' economies, identities and way of life. The stark findings on global sea-level rise in the 2021 report of the Intergovernmental Panel on Climate Change, including the conclusion that continued sea-level rise was locked in for centuries to come, added even more urgency to the

importance of securing maritime zones for future generations. The international community must cooperate to address the challenge. That required the development of appropriate political and policy frameworks, the elaboration of scientific, technical and technological responses, adaptation and resilience-building, and responses to the legal challenges posed by sea-level rise.

105. The Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise of the Pacific Islands Forum set out the region's collective position on how the rules on maritime zones in the United Nations Convention on the Law of the Sea should apply in that context and promoted the principles of legal stability and certainty in respect of maritime zones. The Declaration upheld the integrity of the Convention as the definitive legal framework within which all activities in the oceans and seas must be carried out, while also safeguarding a sovereign and resilient Pacific region.

106. In September 2021, the Alliance of Small Island States, reinforcing the approach set out by the Pacific Islands Forum, had reaffirmed in its Leaders' Declaration that there was no obligation under the Convention to keep baselines and outer limits of maritime zones under review or to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations, and that such maritime zones and the rights and entitlements that flowed from them continued to apply without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.

107. The Convention had been adopted as an integral package containing a delicate balance of rights and obligations that were vital to many States' development pathways. It was in the interests of the international community to preserve that balance and to ensure certainty, security, stability and predictability with regard to maritime zones. New Zealand was committed to working constructively with other States to that end.

108. **Mr. Pieris** (Sri Lanka), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that the functional immunity of State officials with respect to international crimes committed in an official capacity continued to be very controversial. After the Commission had provisionally adopted draft article 7, stating that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction did not apply in respect of the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance, 24 Member States had expressed general support for the draft article, while 18 States had raised concerns. It was therefore unclear as to where States really stood on the matter. The academics seemed to suggest that the relationship between the functional immunity of State officials and combatant immunity had not received adequate consideration, and that question was unsettled even within the Commission. As a result, the draft articles remained without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

109. The International Court of Justice had emphasized in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that immunity from criminal jurisdiction and individual criminal responsibility were separate concepts, and that jurisdictional immunity was procedural in nature, while criminal responsibility was a question of substantive law. The resulting position was that the separation of procedure from substance made it possible to accept that State agents were responsible for international crimes committed in an official capacity, although they might remain immune from prosecution in foreign courts. It would, however, appear that international law could not simultaneously criminalize official acts and allow for immunity in respect of those acts. Any waiver of procedural immunity established the criminality of the act and the responsibility of the actor.

110. Immunity and impunity were not identical and therefore should not be conflated. A strong argument could thus be made that responsibility and immunity were logically incompatible. Sanctions could be legally authorized, even if legal obstacles to punishment arose in the course of criminal prosecution. Moreover, it was widely accepted that high government officials enjoyed personal immunity from criminal jurisdiction, including in respect of international crimes. It was a fact that the practical effect of immunity from arrest and other coercive measures would be such that high officials would never appear before foreign courts empowered to impose individual criminal liability. It was therefore open to debate that substantive criminal responsibility and procedural immunity were logically independent.

111. Turning to the topic "Sea-level rise in relation to international law", he said that sea-level rise disproportionally affected the territorial sovereignty of small island developing States. For those States, it might well result in the displacement of the population and jeopardize their food and water security in the foreseeable future. A fixed baseline approach to the establishment of the outer limits of maritime zones

meant that the maritime boundaries of States were permanent and their baselines would remain unchanged even if coastal areas were inundated as a result of sea-level rise. The United Nations Convention on the Law of the Sea did not exclude the possibility of resorting to either ambulatory or fixed baselines. Perhaps it was time for the Commission to examine whether or not the Convention could be modified by mutual consent or based on the subsequent practice of all States parties.

112. In the view of his delegation, the Commission might be able to develop the rules of customary international law in such a way as to lead to the modification of the Convention with respect to the preferred approach for the delimitation of maritime boundaries. The history of the establishment of exclusive economic zones under the Convention showed that those zones had ultimately been included in the convention by States after the development of a customary norm.

113. **Ms. Mägi** (Estonia), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction" and referring to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), said that her delegation agreed with those Commission members who had expressed the view that a dispute settlement clause would only be relevant if the draft articles were intended to become a treaty. It would be helpful if the Commission could also examine the interactions between draft article 17 and other proposed provisions, in particular draft article 13 (Exchange of information) and draft article 15 (Consultations). It was obvious that any dispute that arose between two States in relation to the determination and application of the immunity of a State official from foreign criminal jurisdiction could be settled through traditional means of dispute settlement, as pointed out by the Special Rapporteur. The aim of establishing rules for the settlement of disputes should be the provision of a simple, speedy and effective model; a comprehensive approach covering different aspects of cooperation between States should be taken in order not to overcomplicate the whole process.

114. Her delegation was in favour of adhering to the traditional means of dispute settlement. It saw no need for the creation of a separate body, as that would make the issue even more complex. Since the jurisdiction of the International Court of Justice was not universally recognized, the focus should be placed on achieving that end, rather than on creating a new permanent body, the jurisdiction of which would also have to be universally accepted in order for it to function properly. Estonia agreed with the Special Rapporteur that it was preferable to wait until the full set of draft articles was adopted on first reading before taking a decision on the matter.

115. Estonia was pleased that the Commission had examined the relationship between the topic and international criminal tribunals. It noted with interest the inclusion of a "without prejudice" clause in draft article 18. Further consideration should be given as to whether to include the provision as a separate draft article or to merge it with another draft article. Her delegation considered that draft article 18 was interrelated with other draft articles, and therefore agreed with those Commission members who were in favour of including it as draft article 1, paragraph 3.

116. Her delegation agreed with the Special Rapporteur that it was not necessary to formulate specific proposals regarding the issue of recommended good practices. While good practices were of great interest, there was no need to include them in the draft articles.

117. Estonia reiterated its view that the crime of aggression should be included in paragraph 1 of draft article 7, as provisionally adopted by the Commission at its sixty-ninth session, in the list of crimes in respect of which immunity *ratione materiae* did not apply.

118. Turning to the topic "Sea-level rise in relation to international law", she said that the first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) provided an excellent overview of the problems arising from the potential legal effects or implications of sea-level rise. Estonia agreed with the main conclusions of the paper, and it welcomed the idea that the Study Group could, if needed, consider inviting scientific and technical experts to its future meetings.

119. The United Nations Convention on the Law of the Sea was the fundamental pillar of ocean governance and must remain the overarching legal framework within which the topic was considered. Her delegation therefore agreed that the aim of the Study Group should be to find solutions in the Convention to the challenges connected to sea-level rise. The need to preserve legal stability, security, certainty and predictability in international relations must also be kept in mind. Her delegation was satisfied that the Study Group had found ways to interpret the Convention that corresponded to the need for stability in inter-State relations.

120. Estonia supported the idea that, after the negative effects of sea-level had occurred, Member States could stop updating the notifications they had deposited, in accordance with the Convention, regarding the baselines and outer limits of maritime zones measured from the baselines, in order to preserve their entitlements. It also noted with interest that, according to the first issues

paper, State practice already generally supported the preservation of existing maritime delimitations. Issues related to existing claims concerning the delimitation of future maritime areas would still need further consideration by the Study Group.

121. Estonia noted that, according to the first issues paper, regional or particular customary rules of international law might have emerged in connection with sea-level rise and that in order to draw definite conclusions, more submissions from States would be needed. Her delegation agreed with the analysis of the Study Group that if the principle of *rebus sic stantibus* was applied in the case of sea-level rise, it would require the renegotiation of maritime boundaries, which would create instability in international relations as a result of changing rights and obligations. Estonia therefore agreed that maritime delimitations must be stable and definitive to ensure a peaceful relationship between States in the long term.

122. Her delegation considered that the Study Group had been right to raise questions about the impact of sea-level rise on licences for offshore windfarms, fisheries access agreements and other economic activities in the exclusive economic zone. Estonia also supported the Study Group's intention to extend its study of State practice and *opinio juris* to other regions.

123. **Mr. Flynn** (Ireland), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction" and referring to the draft articles provisionally adopted by the Commission at its seventy-second session, said that Ireland reiterated its view that procedural provisions and safeguards were relevant to the draft articles as a whole. It was pleased that draft article 8 ante reflected that position.

124. Ireland had previously called for a full consideration of safeguards, including in the specific context of draft article 7, and would welcome proposals in that regard, bearing in mind that the Commission had stated, in the commentary to draft article 8 ante, that the draft article did not prejudge and was without prejudice to the adoption of any additional procedural guarantees and safeguards, including whether specific safeguards applied to draft article 7. Given that the Commission had explained in the commentary to draft article 8 ante that various terms required review in the final revision of the draft articles before their adoption on first reading, his delegation's comments in relation to both the draft articles and the commentaries thereto were preliminary in nature.

125. Ireland welcomed the Commission's intention, in draft article 8, to give effect to the determination of the International Court of Justice that the question of immunity should be examined at an early stage and considered *in limine litis*. The term "criminal jurisdiction" had not yet been addressed by the Drafting Committee, and that draft article therefore required further discussion. The interaction between the provisionally adopted draft articles 8 and 9 and the proposed draft article 13 should also be examined once the latter had also been provisionally adopted.

126. Concerning draft article 10, Ireland agreed with the Commission members who had commented, when considering the Special Rapporteur's seventh report (A/CN.4/729), that the invocation of immunity was not a prerequisite for its application, as immunity existed as a matter of international law. It also concurred with those members who had stated that a requirement of invocation of immunity in writing did not necessarily reflect international practice, and reiterated its suggestion that the commentaries indicate when a proposal reflected progressive development of the law.

127. As to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), Ireland, as a strong supporter of accountability, endorsed the inclusion of a "without prejudice" clause in draft article 18 to address the relationship between the draft articles and the rules governing the functioning of international criminal courts and tribunals. It agreed that draft article 18 should merely separate different legal regimes, whose validity and separate fields of application were intended to be preserved, without creating a hierarchy.

128. His delegation also noted the differing views in the Commission on the Special Rapporteur's proposal to include draft article 17 on settlement of disputes. A dispute settlement mechanism could potentially form part of the safeguards aimed at protecting the stability of international relations and avoiding political and abusive prosecutions.

129. It was clear that some of the draft articles and commentaries already provisionally adopted would require further consideration. At the seventy-second session of the General Assembly, his delegation had expressed its concern about the division within the Commission on the provisional adoption of draft article 7 and the commentary thereto and had stressed that further information on practice relating specifically to the non-application of immunity would be helpful. In 2021, a number of members had suggested that the Commission would need to overcome the divergent views on draft article 7. Ireland would welcome proposals on the way forward on the topic.

130. His delegation noted that the Commission had emphasized the importance of giving States an adequate

opportunity to comment on a full set of draft articles at the conclusion of the first reading; that would permit States also to consider the interaction between the various draft articles.

131. As to the topic "Sea-level rise in relation to international law", Ireland shared the concerns of other States about the likely effects of sea-level rise, one of the most visible adverse effects of climate change. The international community must work together to meet the challenges posed by that phenomenon for many States, in particular low-lying and small island States.

132. Ireland noted the preliminary character of the first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1), the very broad range of views expressed by members of the Study Group on many aspects of the subtopic regarding issues related to the law of the sea, the discussion of the Study Group's mandate set out in the Commission's report (A/76/10, para. 285) and the suggestion by some members that the Study Group should be transparent from the beginning in distinguishing between *lex lata*, *lex ferenda* and policy options. Transparency in the Commission's work was important, including with respect to the topic under consideration. Ireland also supported the suggestion that the Commission should be fully guided by its own prior work on the topic. Once the mapping exercise had been completed, possible options for future work could be considered in the light of the analysis presented.

133. The baselines of Ireland were composed of a mixture of normal baselines, straight baselines and bay closing lines. The normal baseline was the low water line along the coast, as marked on maritime charts prescribed by law. Those charts were regularly updated to reflect physical changes in the maritime domain, including any change to the location of the low water line where that had occurred. The normal baseline was ambulatory in the sense that it might move landward or seaward depending on a variety of factors, including coastal erosion and land reclamation. The country's straight baseline system had first been prescribed in 1959 shortly after the adoption of the Geneva Convention on the Territorial Sea and the Contiguous Zone. The basepoints used in the construction of that system had all been physically resurveyed in 2015 using modern technology, and a revised system of straight baselines had subsequently been prescribed by law.

134. His delegation was aware that the Co-Chairs of the Study Group, in making their preliminary observations in the first issues paper, had not had the benefit of information from a large number of Member States on relevant practice and law on baselines, and on hydrographic charts and lists deposited with the Secretary-General. That information was needed before any definitive conclusions could be drawn. Ireland therefore welcomed the Commission's extension, to 30 June 2022, of its deadline for receiving information on relevant State practice and laws.

135. In Ireland, as elsewhere, practice specifically with regard to sea-level rise was at a very early stage. However, many of the measures that would be taken in response to sea-level rise or that might be necessary to protect the coast against it were likely to be similar to those taken in response to natural phenomena such as coastal erosion and coastal flooding, although they would need to be adapted to the new challenges faced. Legal solutions to the problem of preserving baselines and the limits of maritime zones would also have to be explored.

136. His delegation's full statement would be made available in the eStatements section of the *Journal*.

137. **Ms. Ali** (Maldives), speaking on the topic "Sea-level rise in relation to international law", said that countries such as her own were threatened with the loss of not only territory but also livelihood and critical infrastructure. Adaptation efforts and disaster risk reduction measures could only address the threat in part. The problem required international legal solutions that could provide the necessary stability and certainty to affected States.

138. Given its vulnerability to the effects of sea-level rise, Maldives had long supported international action. In 1989, it had hosted the first Small States Conference on Sea Level Rise, bringing together 14 small island States to sign the Malé Declaration on Global Warming and Sea Level Rise. The Conference had led to the establishment of the Alliance of Small Island States. Maldives remained committed to working with the General Assembly, the Human Rights Council, the United Nations Framework Convention on Climate Change and the Commission to find durable and comprehensive global solutions to the urgent challenge of sea-level rise.

139. Her Government had undertaken extensive adaptation measures to combat the effects of sea-level rise, including by constructing sea walls and undertaking beach replenishment. Its efforts to preserve coastlines through artificial means were extremely costly, yet did no more than maintain the status quo. Adaptation alone could not provide a sustainable solution to ongoing sea-level rise. Resilience-building and fortification efforts were consuming an ever-increasing share of its national budgets, a challenge that had been exacerbated by the strain imposed by the coronavirus disease (COVID-19) pandemic. As many

small islands and coastal States could not afford to mitigate the effects of sea-level rise on their own, the cooperation of the international community was essential to ensure adequate, predictable and accessible assistance to those States. At the same time, greenhouse gas emissions must be reduced in order to prevent global warming, which eventually led to sea-level rise.

140. In interpreting the United Nations Convention on the Law of the Sea, the Commission must continue to examine the practice of the States most affected by sea-level rise. It was her delegation's understanding that the Convention required States to deposit their charts with the Secretary-General, but that it did not require regular updates to those submissions. Once a State had deposited the relevant charts, its baselines and maritime entitlements were fixed and could not be altered by any subsequent physical changes to the State's physical geography as a consequence of sea-level rise. That interpretation was necessary to ensure stability, security, certainty and predictability. Her delegation agreed with the view expressed in the first issues paper that the Convention did not prohibit States from preserving their previously established baselines and the associated maritime entitlements.

141. The Commission had requested more evidence of State practice and *opinio juris* in relation to maritime entitlements. Her delegation agreed that, as mentioned in the first issues paper, there was a trend in State practice suggesting that baselines were fixed, and it encouraged other States to support the Commission's work as it examined State practice in various regions. Wherever possible, States should provide the Commission with examples of practice related to baselines and navigational charts.

142. **Mr. Howe** (United Kingdom) said that his delegation commended the Commission's measured approach to the sensitive topic of immunity of State officials from foreign criminal jurisdiction, while noting that substantive issues, including areas of significant disagreement, remained to be addressed and that considerable further work was required before the draft articles were presented to States for their views. The United Kingdom nevertheless hoped that that would be possible before the end of the current quinquennium.

143. His delegation took note of the progress made by the Commission during the current session, including its provisional adoption of draft articles 8 ante, 8, 9, 10, 11 and 12 and the commentary thereto, and emphasized that any proposals which the Commission made in relation to procedural requirements must be capable of application across diverse national legal systems. It also underlined the practical significance of the Commission's work in that area for national authorities. It would be preferable if the obligation to consider immunity was triggered only where the competent authorities of the forum State were considering the exercise of criminal jurisdiction in respect of an individual; where that individual, or the State that he or she purported to represent, made clear that the status of a State official was claimed; and where the proposed exercise of criminal jurisdiction would, if the claim to that status was found to have merit, engage or impinge on the immunity owed to the individual by virtue of that status.

144. In relation to draft article 11, paragraph 5, his delegation took note of the Commission's discussion on the irrevocability of waiver of immunity and welcomed the request for States to provide comments. The United Kingdom noted the dearth of State practice in that area. At the same time, it cautioned against making an assumption that, just because States did not regularly revoke waivers of immunity, there must be an absolute rule against such revocations. The possible exceptions identified by members of the Commission in paragraph (15) of the commentary were by their very nature exceptional. As with the other provisions already considered by the Commission, the United Kingdom reserved its position until a full set of draft articles could be read together in context. However, given the importance of legal certainty, it was vital for the commentary to paragraph 5 to provide a full explanation of the purpose and meaning of any text that the Commission adopted, as well as any conflicting views. His delegation also emphasized that the revocation of a waiver must not be made arbitrarily.

145. With regard to the Commission's discussion on the form of its output on the topic, his delegation reiterated that it was of vital importance for the Commission to clearly indicate those draft articles which it considered to reflect existing international law and those which it did not, whether because they constituted progressive development of international law or because they amounted to proposals for new law. If the goal was for the draft articles to act as a set of guidelines for use in domestic courts, States and their judges and practitioners needed to know what the Commission considered to be existing international law. Conversely, if the aim was to make a proposal to States for new law to regulate the topic, that should be clearly stated. If the Commission's work on the topic was going to contain proposals for the progressive development of the law or new law, the appropriate form for the final outcome should be a treaty.

146. Turning to the topic "Sea-level rise in relation to international law', he said that his delegation looked forward to considering the results of the Study Group's

deliberations on the issues of statehood and the protection of persons affected by sea-level rise, as well as the consolidated results of the work undertaken by the Commission at its seventy-second and seventy-third sessions.

147. **Ms. Chigiyal** (Federated States of Micronesia), referring to the topic "Sea-level rise in relation to international law", which was of urgent importance for small island developing States like her own, said that her delegation supported treating sea-level rise as a scientifically proven fact of which the Commission could take notice, with the understanding that such sea-level rise was mainly anthropogenic.

148. In order to ensure legal stability, security, certainty and predictability, maritime zones and the rights and entitlements that flowed from them must be maintained without reduction, regardless of climate change-related sea-level rise. That was at the core of the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, in which the leaders of the Pacific Islands Forum had expressed their views on the requirements of existing relevant international law on maritime zones in the specific context of climate change-related sea-level rise and had described their current and intended future State practice in the light of those requirements. The preservation of maritime zones and the rights and entitlements that flowed from them in the face of climate change-related sea-level rise was supported by the United Nations Convention on the Law of the Sea and the legal principles underpinning it, thereby reflecting the right of the countries concerned to permanent sovereignty over their natural resources. As a necessary corollary, the Federated States of Micronesia was under an obligation to respect the maritime zones of other States, just as it expected other States to respect its rights in that regard.

149. Her delegation would like to hear more about the suggestion by some Commission members that there might be a continuum of intermediate possibilities between ambulatory and permanent baselines. However, such possibilities must honour the core notion under existing relevant international law that the rights and entitlements that flowed from the maritime zones originally established by a coastal State must never be reduced solely on the basis of climate change-related sea-level rise.

150. Her delegation appreciated the Study Group's intention to consider sources of relevant international law beyond the Convention, including general principles and rules of international law. It was interested in the Study Group's consideration of the principles of equity, good faith and permanent sovereignty over natural resources, all of which it considered to be relevant not only to the law of the sea, but also to questions of statehood and protection of persons affected by sea-level rise.

151. **Mr. Ghazali** (Malaysia), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that, once the full set of draft articles had been finalized, Member States should be given an opportunity to comment on them to ensure that all delegations were equally informed. With regard to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), his delegation agreed on the whole with draft article 17, but stressed the need for an acknowledgement that the suspension of national proceedings pending international dispute settlement would be particularly deferential to the State of the official. With regard to paragraph 2, his delegation agreed with the Special Rapporteur that the inclusion of a time limit would be beneficial to avoid any delays to the dispute settlement process. That said, in view of the sensitivities and characteristics of the issue of immunity, and in order to have a clearer idea of what the most appropriate time limit would be, Malaysia proposed that the Special Rapporteur conduct an in-depth study on the possible benefits and drawbacks of a 6-month and 12-month time limit.

152. Malaysia welcomed the inclusion of draft article 18, which acknowledged the need to safeguard the relevance and importance of international criminal tribunals in the fight against impunity for the most serious crimes of international concern. His delegation was flexible about whether it was placed as draft article 18 or draft article 1, paragraph 3.

153. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation appreciated the analysis of the topic and the views expressed by members of the Study Group, as well as the examples of practice provided by Member States. Bearing in mind the Study Group's mandate, it urged States to proceed cautiously so as not to modify existing international law, in particular the United Nations Convention on the Law of the Sea.

154. Reclamation activities might alter a State's maritime space, with the attendant legal effects, while sea-level rise might also affect the outer limits of a State's maritime zones. However, States must not be permitted to enlarge their maritime space under the pretext of sea-level rise. Malaysia shared the view of the majority of States that maritime baselines, limits and boundaries should be fixed in perpetuity, regardless of sea-level rise.

The meeting rose at 6 p.m.