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Chair: Ms. Al-Thani . . . . . (Qatar)

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21-15734 (E)

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

Statement by the President of the International Court of Justice

1. **Ms. Donoghue** (President of the International Court of Justice) said that, as the current International Law Week was taking place in a hybrid format, without the opportunities for personal engagement and informal exchanges that were so vital for those working in the field of international law, she would be speaking on the similarities and differences in the roles of international judges and government legal advisers, since that was a topic about which she was often asked when chatting with those who advised their Governments on matters of international law. Prior to her election to the International Court of Justice in 2010, she herself had been a foreign ministry lawyer, most recently serving as the senior career attorney in the Office of the Legal Adviser of the United States Department of State.

2. Although, at first sight, it might seem that the roles of international judges and government legal advisers had little in common other than the subject of public international law, there were in fact important similarities between them. First, since the core substantive work of both a foreign ministry legal adviser and an international judge involved public international law, legal advisers, in their work of interpreting treaties and giving advice on the existence and content of customary international law, used the same tools as those available to a judge. For example, in their advice to ministers, they could be expected to apply the rules of treaty interpretation that were reflected in the Vienna Convention on the Law of Treaties, as did also the Court's judges.

3. Second, neither government legal advisers nor international judges were free to select the topics on which they worked. Government legal advisers, especially at a senior level, must be prepared to answer questions on all aspects of international law, since they had no control over the world events and national priorities that drove questions from ministers. Similarly, the legal issues that the Court's judges were called to address depended on the contentious and advisory proceedings brought to the Court by States and United Nations bodies. In both roles, there was great value in being a generalist, with broad knowledge of the entire field of public international law and a sufficiently deep understanding of each of its subfields to be able to consider precise questions in a probing and insightful way. For example, as a government lawyer, she had often been able, when negotiating treaties in one subfield of international law, to draw inspiration from approaches followed in treaties in another subfield.

4. Third, the idea of precedent was an important consideration for both government legal advisers and international judges. A government legal adviser, in formulating advice on a current issue, must consider both the positions that his or her State had taken in the past and the potential precedential implications of a position in the future. More generally, the legal adviser must broaden the analysis beyond the interpretation of a given treaty, for example, reminding policymakers of the implications of a specific decision for a State's overall reputation as a reliable treaty partner. While the Court was not bound by precedent in the manner of a common law court, it attached great importance to the consistency of its jurisprudence, which it usually described using the French expression "*jurisprudence constante*". To that end, the Court's judges took stock of what had been said in the past and considered the possible implications of a judgment for matters that might arise in the future. They had to think carefully about the way in which they framed their pronouncements on the law and, in virtually every case, had to decide whether to state a legal proposition broadly or narrowly, a choice that was also faced by government legal advisers. For example, if an adviser had come to the conclusion that the law entitled a given foreign official to immunity, he or she would then need to decide whether the Government should explain that decision based on considerations particular to the circumstances of the official in question or on a broader assertion about the scope of immunity of officials. Such decisions would undoubtedly be weighed in the light of precedential considerations, among others. At the Court, judges often differed on whether they wished to frame a particular statement of law in general terms, with potentially broad application, or to make a pronouncement limited to the particular situation in that case. Academic commentators were often eager for broad pronouncements on the law. However, in drafting a judgment, she always sought to be sure that a general proposition of law was robust enough to remain valid in the face of facts that might be very different from those in a particular case and, having been trained in the common law tradition, she conducted constant mental exercises to test possible formulations of legal propositions against hypothetical factual situations. In the event of doubts, she often considered how the statement of the law might be refined to avoid unwarranted implications. That intellectual exercise had much in common with the approach that she might have taken as a government legal adviser in reviewing, for example, a proposed statement by the Department of State Press Office. Given the importance of considerations of precedent in both contexts, occasions also arose when it could be attractive to avoid

expressing a position on a particular issue, such as when an issue presented uncertainties as to both the facts and the law. A difficult question of law could sometimes be avoided if a factual pronouncement rendered the legal question irrelevant, while, conversely, a conclusion of law could obviate an inquiry into contentious facts. That dynamic could be seen at play in the Court's judgments and orders.

5. Fourth, confidentiality about the deliberative process was important to high-quality decision-making both in the Court and in Governments. While the Court's written proceedings and hearings were open to the public, there were strong institutional imperatives against revealing what took place during deliberations. The Court's judges were elected with the expectation that they would bring diverse perspectives to the Court, and, consequently, it was entirely appropriate that they did not always agree. They also needed to have the freedom to learn from each other, and to adapt and revise their own views after hearing those of their colleagues. After the conclusion of its deliberative process, the Court communicated its views only through its written judgments and orders, while judges were also free to express their individual views in written opinions appended to a judgment. However, the deliberations themselves were maintained in strict confidence. Governments had more channels than the Court for communicating externally on a question of international law, including through litigation, a negotiating position, a speech by a senior official, a press release or remarks before a forum such as the Sixth Committee. However, their words on any difficult issue would be chosen with care, with consideration of their specific and more general implications and often after internal disagreements about how to proceed. As with deliberations within the Court, confidentiality was thus important to permit full consideration of a range of factors.

6. Turning to the differences between the role of a government legal adviser and that of a judge, she said that legal advisers had a client, which was the State. Ministers personified that client at any given time, setting the direction of the State's policies, which then played an important role in framing the questions that the legal adviser faced. Although that did not mean that the legal adviser should always find a way for a favoured option to be pursued, even in the face of legal concerns, it did mean that the focus of the legal advice provided was to enable the pursuit of policy objectives, in a manner consistent with the legal adviser's appreciation of the law. That focus was especially relevant in circumstances where the content of international law was indeterminate, such as when the legal adviser considered that there was more than one reasonable interpretation of a treaty. In such a case, the legal adviser might indicate that the path favoured by the ministers was legally available but that the legal interpretation underlying it was subject to valid questioning by other States. International judges, who had no client, were guided by different parameters in their approach to situations of legal indeterminacy. While a judge should not decide on the basis of his or her overall attitude to the two States parties to a case or the relationships that those States had to the judge's State of nationality, it was entirely appropriate that, on matters such as human rights and self-determination, the views of judges should be influenced not only by their own lived experiences but also by the historical experiences of their respective States of nationality, bearing in mind that elections to the Court took place in full awareness of the differences among States. It was through the genuine airing of a variety of perspectives in frank, confidential and detailed deliberations that the International Court of Justice operated truly as a World Court. That said, judges should at the same time always be cautious not to proceed reflexively on the basis of initial impressions, but to reflect on the perspectives of others before forming a view. As Manfred Lachs, former President of the Court, had stressed, judges must be mindful of the impact that their particular training, background and legal tradition might have on the impulses leading them in a particular direction and always test their legal analysis against the highest standards of intellectual honesty.

7. A second difference between the two roles was that legal advisers were generally asked to provide advice at short notice, while the internal deadlines for international judges were generally less immediate. As an international court, the Court placed priority on collaborative and inclusive work methods, with the involvement of all judges in matters of procedure and substance. It also produced lengthy, detailed legal analysis that was not typical of the day-to-day work of government legal advisers, and several cases were usually under deliberation at the same time, requiring the Court and the Registry to manage competing priorities in parallel.

8. Lastly, a judge operated in a more limited strategic space than a government legal adviser. For example, in a hypothetical situation, where a river ran through two States, one of which lay downstream of the other, and the environment minister of the downstream State had determined that the water in the river was being polluted by industries in the upstream State, the legal adviser of the downstream State could, in addition to the possibility of proposing a treaty in which the two States

agreed that the upstream State was liable, devise a number of other options for addressing the dispute, such as, for example, an ex gratia payment by the upstream State, a contribution by the downstream State to the costs of pollution control measures to be taken by the upstream State, the establishment of a claims commission to settle claims by the nationals of the downstream State, or the engagement of a mediator. Such options would not normally be available to an international court asked to decide a legal dispute. In the hypothetical case described, an application to the court by the downstream State would normally present the question of whether the upstream State had violated its legal obligations. The task of the court would be to evaluate the legal consequences of what had occurred and, if it found that the responsibility of the upstream State was engaged, to order reparations, in a decision that would bind the parties.

9. The more limited strategic space in which international courts operated was a deliberate part of their design, given that their jurisdiction was based on the consent of States. The consent to jurisdiction meant that the two States no longer controlled the outcome of their dispute, which was placed in the hands of an institution empowered to bind them. It was therefore appropriate that a court was limited to settling legal disputes in accordance with the applicable law, without the scope to impose solutions that were not legally mandated. The relationship between any two States was inevitably complex and multifaceted, even when they enjoyed close ties with each other. A case before the Court provided a way to channel a particular legal dispute into a highly structured proceeding in which both States had an opportunity to present their cases on the law and the facts on the basis of equality. While that was by no means the only way for two States to settle a dispute, it was unquestionably an option that could contribute to peace and security.

10. **Mr. Abdelaziz** (Egypt) said that the judgments delivered by the International Court of Justice shaped international law and could affect international relations for years to come. He would like to know the extent to which judges were cognizant of that fact when they were about to issue a judgment likely to have a major impact on the future interplay of international relations.

11. **Mr. Tichy** (Austria) said that he found the difference between common law and civil law to be greatly exaggerated when it came to finding solutions to problems of international law. It would be interesting to know whether the President of the International Court of Justice had come across important divergences between the two approaches.

12. **Mr. Alabrune** (France) said that questions were often raised about consistency between the Court's interpretation of matters of public international law and that of other international courts, whether regional or universal. While the Court clearly had the most authority, he would like to know how such consistency could be strengthened and what might be the Court's contribution in that regard. He also wondered whether greater dialogue could be developed.

13. **Ms. Donoghue** (President of the International Court of Justice) said that, in their deliberations, the Court's judges were always very cognizant of the bigger picture because the parties to any dispute always framed the specific legal questions in that broader context, as they sought to persuade the Court to go in a particular direction. Her own impression was that the judges saw such considerations as helping them to understand the specific questions that faced them but that their internal discussions were about the law and the facts as they understood them. They did not see it as their job to try to guide the outcome in a particular direction as far as the impact on international relations was concerned.

14. Turning to the question raised by the representative of Austria, she said that, as a government legal adviser, she had really only come across divergences between common law and civil law traditions when working on topics involving national legal systems, such as cooperation in criminal law. However, huge differences between the two systems were evident when it came to the operations of the Court, because of the very different domestic legal traditions in which judges had been trained. Such differences were evident in such areas as the conduct of hearings, the type of evidence that was considered relevant, the type of questions that were put to witnesses, and in particular the drafting of judgments.

15. With regard to the relationships among various courts and their pronouncements, she viewed international law as fundamentally decentralized, given that no international legislature existed. The pronouncements of the International Court of Justice were binding only on the parties to a dispute and it spoke only on the issues brought before it; unlike in a national system, where a supreme court might speak authoritatively, there was no hierarchy. The Court had become much more open to making use of the jurisprudence of other courts, including regional courts, and was citing them more frequently than in the past.

16. On the question of dialogue, while the Judicial Club of the Hague provided an opportunity for the judges of various international courts to meet periodically, it did not serve as a venue for the Court to

engage in dialogue on substantive issues, given that the other courts primarily focused on matters of international criminal law. However, the Court's judges did engage in dialogue, in a sense, through their careful study of the jurisprudence of other courts, especially in the area of the law of the sea, where the Court carefully followed the jurisprudence of the International Tribunal for the Law of the Sea, and vice versa. In general, the Court greatly valued the jurisprudence of other courts and tribunals and did not necessarily attribute less weight thereto than to its own jurisprudence.

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

17. **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).

18. **Mr. Wong** (Singapore), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that Singapore wished to reaffirm the importance of safeguarding the immunity of State officials, where applicable, in the interests of the stability of international relations and the sovereign equality of States. At the same time, a margin of appreciation and flexibility must be accorded to States when addressing such matters.

19. With regard to the draft articles provisionally adopted by the Commission at its seventy-second session, his delegation appreciated the Commission's efforts in paragraph 2 of draft article 8 (Examination of immunity by the forum State) to strike an appropriate balance between the forum State's exercise of sovereignty in criminal matters and certain procedural guarantees arising from the immunity of foreign State officials. It would be helpful if the realities of the circumstances in which States took coercive measures in the exercise of their criminal jurisdiction could be addressed in the commentaries. In particular, the Commission should clarify that the obligation in paragraph 2 did not preclude a State from taking necessary and proportionate measures to prevent harm in response to an imminent and unlawful use of force. The same comment applied to draft article 9, paragraph 1, concerning the obligation for the competent authorities of the forum State to notify the State of a foreign official, including before taking coercive measures that might affect that official. In addition, it was his delegation's understanding that the forum State's obligations to examine the issue of immunity and notify the State of the foreign official logically arose only when the forum State became aware that the relevant individual was a foreign State official whose immunity might be affected. That should be made clear in the draft articles and commentaries.

20. With regard to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), it was his delegation's understanding that draft article 17 (Settlement of disputes) was not intended to provide for compulsory dispute settlement. As such, it was inappropriate to set time limits for negotiations or prescribe specific procedures. Furthermore, in view of the bilateral contexts in which many issues of immunity of State officials arose, the draft article should not unduly restrict the options for the peaceful settlement of disputes by limiting the range of dispute settlement mechanisms to which States might have recourse. As for draft article 18, his delegation agreed with the Commission that any question of immunity before international criminal tribunals was outside the scope of the present topic. If the Commission considered it necessary to address the relationship between the topic and the immunity of State officials before international criminal tribunals, that should be indicated in draft article 18. Singapore agreed with those Commission members who had expressed their preference for including the provision in draft article 1, given that it was intended to clarify the scope of the draft articles.

21. Bearing in mind that the Commission members continued to hold diverging views on certain issues, including exceptions to immunity *ratione materiae* under draft article 7, provisionally adopted at the Commission's sixty-ninth session, and possible exceptions to the irrevocability of waivers of immunity under draft article 11, paragraph 5, provisionally adopted at its most recent session, it was important that Member States be given the opportunity to comment on the full set of draft articles at the conclusion of the first reading. Singapore looked forward to the Commission's further work on the topic.

22. Turning to the topic "Sea-level rise in relation to international law", he said that Singapore faced an existential threat from rising sea levels and strongly supported efforts to identify possible solutions to address the plight of small, low-lying island States like his own. His delegation had reviewed with great interest the first issues paper 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) and the Study Group's discussion on that paper. It fully appreciated the need to examine in further detail the complex issues identified therein, on which there was a diversity of views, and was heartened that the Study Group would be undertaking further in-depth studies, including an examination of principles and rules of international law underpinning the United

Nations Convention on the Law of the Sea, on a priority basis. A workable way forward for the international community could be to take into account the different considerations of equity that might apply in varying circumstances and ensure that the balance of rights and obligations under the Convention was preserved. The principle of equity could be particularly relevant when considering the impact of climate change-induced sea-level rise on the development needs of small island developing States. Furthermore, such considerations might operate differently depending on the types of maritime zones and the rights exercisable within them, the types of baselines involved, the issue of whether the areas in question involved overlapping entitlements, and the extent to which the interests of third States and the freedom of navigation were engaged.

23. Singapore supported the view that, in general, negotiations should not be easily reopened on maritime boundaries delimited by agreement through treaties or by decisions of international courts or tribunals. That said, each treaty needed to be interpreted in accordance with its terms in their context and in the light of its object and purpose, as well as the surrounding circumstances.

24. Singapore commended the efforts of the Study Group to engage with delegations across different geographical regions and strongly encouraged the Commission to continue such active engagement in its future work on the topic, in order to take into account the diverse views and interests of all States.

25. **Mr. Kanu** (Sierra Leone), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that his delegation welcomed the substantive progress made by the Commission in provisionally adopting six draft articles at its seventy-second session and observed that the Commission's objective in all those draft articles seemed to have been to find a balance between the interests of the forum State and those of the State of the official. It considered that the Commission's focus on addressing the issue of procedural safeguards was appropriate and noted the significant developments in that regard. In particular, it noted with interest the provisional adoption of draft article 8 ante, providing that the procedural provisions and safeguards in Part Four would be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerned any of the draft articles contained in Part Two and Part Three of the draft articles, including to the determination of whether immunity applied or did not apply under any of the draft articles, which thereby confirmed that Part Four also applied to draft article 7.

26. His delegation hoped that the Commission would complete its first reading during the current quinquennium, so that States could comment on the full set of draft articles. Sierra Leone joined other States in calling for the Commission to come together on a way forward on the topic. In that regard, the Commission would need to overcome the divergent views of its members on draft article 7, as well as to consider the question of inviolability and the outstanding definitions in draft article 2 [3].

27. Speaking on the topic "Sea-level rise in relation to international law", he said that his delegation welcomed the progress made by the Commission during its seventy-second session and commended the two Co-Chairs of the Study Group for their extensive work on the first issues paper (A/CN.4/740 and A/CN.4/740/Corr.1) and the preliminary bibliography (A/CN.4/740/Add.1). With regard to the latter, Sierra Leone reiterated its general call for inclusivity and full representation of the diverse sources of juristic contributions reflective of the contemporary international law community and, in that respect, commended the Co-Chair (Mr. Cissé) for the presentation given on the practice of African States regarding maritime delimitation. While his delegation agreed that maritime delimitation was an important issue for coastal States, including African coastal States, it would further study the presentation, particularly with regard to the outcome of the survey, as described in paragraph 260 of the report of the Commission on the work of its seventy-sixth session (A/76/10), and the view of the Co-Chair that the application of principles of public international law in the African context could favour fixed baselines or permanent maritime boundaries. With regard to studies or instruments evidencing the emergence of State practice in line with the Co-Chairs' view on fixed baselines or permanent maritime boundaries outside Africa, his delegation recalled with interest resolution 5/2018 adopted at the 78th Conference of the International Law Association, and the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise adopted by the leaders of the Pacific Islands Forum.

28. His delegation noted the divergent views of Commission members regarding the need for stability, security, certainty and predictability, and the need to preserve the balance of rights and obligations between coastal and other States. It also noted with interest that the Study Group, while welcoming the suggestion that the meaning of "legal stability" in connection with the present topic needed further clarification, had noted that the statements delivered by Member States in the Sixth Committee seemed to indicate that, by "legal stability",

they meant the need to preserve the baselines and outer limits of maritime zones.

29. Sierra Leone appreciated the fact that the Commission, in its discussion on the first issues paper, had fully recognized the legitimate concerns expressed by States on sea-level rise, together with the need to approach the topic in full appreciation of its urgency. With regard to the future programme of work, his delegation looked forward to the Study Group's consideration of issues relating to statehood and the protection of persons affected by sea-level rise at the Commission's seventy-third session.

30. With reference to the Commission's decision to include the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work, as already welcomed by a number of delegations, Sierra Leone echoed the call for the inclusion of that topic in the current programme of work as soon as possible so that the Commission could continue to contribute to clarifying the sources of international law.

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

32. **Mr. Asiabi Pourimani** (Islamic Republic of Iran), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that his delegation reiterated its disappointment with the formulation of draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), which remained a central issue following its provisional adoption by the Commission. The Islamic Republic of Iran maintained that draft article 7 was not applicable to immunity *ratione personae*. Such immunity, which derived from the immunity of States, lasted during the official's term of office. State officials other than those enjoying immunity *ratione personae*, and all former officials, enjoyed conduct-based immunity, which lasted forever but applied only to acts performed in an official capacity. The European Court of Human Rights, in paragraph 202 of its judgment in the case of *Jones and Others v. the United Kingdom*, had stated:

> The first question is whether the grant of immunity *ratione materiae* to State officials reflects generally recognised rules of public international law. The Court has previously accepted that the grant of immunity to the State reflects such rules. Since an act cannot be carried out by a State itself but only by individuals acting on the State's behalf, where immunity can be invoked by the State then the starting-point must be that immunity *ratione materiae* applies to the acts of State officials. If it were otherwise, State immunity could always be circumvented by suing named officials.

33. That approach had been implicitly accepted by the International Court of Justice in its judgment in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, in which it had not differentiated between the two types of immunity. It had been further bolstered by that Court's judgment in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case, which had implied that substantive rules of international law could not overcome procedural rules. Thus, while his delegation accepted that immunity did not exonerate an individual from responsibility, it was of the view that limiting the scope of immunity in favour of the responsibility of State officials must be grounded in coherent State practice. Furthermore, instead of drawing up a list of specific crimes, it would be better to apply exceptions solely with respect to the most serious crimes of international concern, since it was questionable whether State practice and jurisprudence supported the inclusion of crimes such as torture or enforced disappearance within the scope of exceptions to immunity *ratione materiae*. For example, in *Jones and Others v. the United Kingdom*, the European Court of Human Rights had effectively concluded that torture was an official act entitled to immunity from civil suit in the courts of other countries.

34. Referring to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), he said that his delegation was of the view that draft article 17 should be read together with draft article 7. Bearing in mind the controversy surrounding draft article 7, as reflected in the statements delivered by delegations in the Sixth Committee in previous years, draft article 17 would be applied only as a mechanism for the production of disputes, which would escalate tensions in relations between States. In addition, the inclusion of a dispute settlement clause would make sense only if the draft articles were to become a treaty. Given that the Commission had yet to decide on the final outcome of the topic, it seemed that the time was not ripe for the inclusion of such a clause. Moreover, in the light of its relationship with the Sixth Committee, the Commission had mostly avoided including such final clauses at the start of its work on a topic. The views of Member States were vital for the final product of the Commission which would be completed on second reading. If it took the form of draft articles, the Sixth Committee would determine whether a treaty should be negotiated on the basis of the draft articles, either within the Committee or at a diplomatic conference convened for that purpose. It was also important to remember that

the Commission's work on peremptory norms of general international law had not been completed and could not therefore be taken as a precedent. The Special Rapporteur for that topic had not excluded the possibility that draft conclusion 21 might be reviewed to take account of the reactions of States, while noting that the wording "recommended practice" had been used in the original text of the draft conclusion.

35. With regard to draft article 18, his delegation considered that the fact that an individual could be prosecuted by an international tribunal did not affect his or her immunity before the courts of a foreign State, given that the individual's immunity from foreign criminal jurisdiction emanated from the principle of the sovereign equality of States, whereas his or her potential prosecution by an international tribunal derived from the consent of States to the jurisdiction of that tribunal. In other words, a "without prejudice" clause with respect to the relationship between national courts and international tribunals was of no relevance to the current topic, which related only to the manner of application of foreign criminal jurisdiction. Moreover, draft article 1, paragraph 2, already contained a "without prejudice" clause, the wording of which was more acceptable and logical, and which could be construed as more comprehensive. In addition, it was doubtful whether draft article 18 could be applied to States that were not parties to the statutes of the international criminal tribunals, in particular the Rome Statute of the International Criminal Court.

36. With regard to the Special Rapporteur's proposal that "recommended good practices" might be included in the draft articles, his delegation was of the view that such recommendations, based on policy preferences and not on concrete measures, might lead to unbalanced practices liable to disrupt the international legal order based on recognized general principles of international law such as non-intervention, international cooperation and the sovereign equality of States.

37. His delegation reiterated its disagreement with draft article 11, paragraph 4, regarding the procedural requirements of the waiver of immunity, as provisionally adopted by the Commission. The Islamic Republic of Iran was of the view that waiver of immunity, as a procedural rule, was the exclusive right of sovereign States and should be declared by the State concerned in a manner that manifested the will of that State to waive the immunity of its official. In addition to being express and clear, the waiver should mention the name of the official whose immunity was being waived. With regard to paragraph 4 as proposed by the Special Rapporteur in her seventh report (A/CN.4/729), his delegation could not agree that a general obligation deduced from a treaty in a substantive matter relating to individual responsibility could be deemed an express waiver.

38. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation attached great importance to the law of the sea and related issues, including sea-level rise. However, given the scientific nature of the topic, the exact range of the impacts of sea-level rise on the entire planet was not yet known. Given that the facts presented in the issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) indicated a lack of sufficient State practice on the topic, the Commission should be cautious in its studies, particularly with regard to issues related to the protection of persons affected by sea-level rise, which the Study Group was to address at the Commission's seventy-third session.

39. His delegation agreed with the position that the maritime zones designated by States could not be assimilated with established territorial boundaries. Coastal States, in determining their maritime zones, enjoyed sovereign rights granted under customary international law. Sea-level rise might inevitably lead to changes in baselines and, consequently, the outer limits of maritime zones. Nonetheless, any changes in baselines should be based on the principles of equity and fairness. The practice of land reclamation, coastal fortification and other means to maintain coastal areas, base points, baselines and islands could be considered an appropriate response to sea-level rise. However, such fortifications would not result in the creation of any new rights for States. In addition, as was confirmed in the issues paper, maritime entitlements might be reduced or completely disappear in the event of land loss. In that regard, his delegation was of the view that, in line with article 60, paragraph 8, of the United Nations Convention on the Law of the Sea, artificial islands, installations and structures did not possess the status of islands. Any discussion about the relationship between artificial islands and changes in maritime zones as a result of sea-level rise was therefore irrelevant.

40. **Mr. Alabrune** (France), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that, as the International Court of Justice had emphasized, customary rules regarding immunity did not relieve the beneficiaries thereof of all criminal responsibility and must not lead to impunity. That said, such rules were solidly rooted in contemporary State practice and played an essential role in the development of good relations between States.

41. With regard to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739),

his delegation wondered why draft article 17 (Settlement of disputes) had been referred to the Drafting Committee, when important issues remained under discussion. In particular, clarification was needed as to whether such a mechanism was intended to be a dispute settlement mechanism that could be established as the result of the application and interpretation of a future treaty, or a procedural mechanism for overcoming any deadlocks that might arise from the application of international law concerning immunity. In the latter case, if, as explained by the Special Rapporteur, the mechanism was structured around two basic elements – the linking of the submission to third-party dispute settlement to the suspension of the exercise of criminal jurisdiction by the forum State; and the binding effect of the decision taken by the third party – the free exercise by States of their criminal jurisdiction would be called into question, particularly in cases where a key objective was to combat impunity. In particular, the suspension of domestic proceedings pending settlement of an inter-State dispute seemed to go beyond existing obligations under the law of immunities.

42. Concerning draft article 18, his delegation had taken note of the Commission's discussions regarding the appropriateness of including a clause stating that the draft articles were "without prejudice" to the rules governing the functioning of international criminal tribunals. While the Commission had confirmed that any question of immunity before international criminal tribunals was outside the scope of the topic, there was no consensus within the Commission regarding exactly how such a "without prejudice" clause would contribute to delimiting the scope of the draft articles. In particular, it must not give rise to any doubt about the jurisdiction and autonomy of international criminal tribunals or risk creating a hierarchical relationship between the norms governing international criminal tribunals and those proposed in the context of the Commission's work.

43. With regard to draft article 9, as provisionally adopted by the Commission, while the obligation for the forum State to notify another State that it intended to exercise criminal jurisdiction over one of that State's officials was presented as a procedural guarantee, the provision could, if applied too strictly, significantly limit the forum State's exercise of its criminal jurisdiction. In paragraph (2) of the commentary to that article, the Commission had justified the need for such a guarantee by stating that in order for the State of the official "to be able to exercise those powers, it must be aware that the authorities of another State intend to exercise their own criminal jurisdiction over one of its officials". However, as the Commission had pointed out, treaty instruments providing for some form of immunity of State officials from foreign criminal jurisdiction did not contain any rule imposing on the forum State any obligation to notify the State of the official of its intention to exercise criminal jurisdiction over the official. It was thus clear that the absence of such notification had never prevented the State of the official from exercising its powers.

44. His delegation was of the view that the Commission should focus on finalizing a set of draft articles that could gain broad consensus. To that end, it was important that States be given the opportunity to comment on a full set of draft articles at the conclusion of the first reading.

45. With respect to the topic of sea-level rise in relation to international law, France, a State with vast coastal and maritime areas, stood ready to engage in continued dialogue and to provide the Commission with all necessary assistance to contribute to the success of its work. His delegation believed it was important that the Commission's work be conducted entirely in public in order to ensure the transparency of its discussions, especially given that the first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) had apparently been subject to considerable debate within the Study Group. Regrettably, however, the Study Group format meant that only the annual summary of its work on the topic and the final report to be adopted at the end of the process would be made public. The Commission should fully and transparently involve the Sixth Committee in its work on a topic that was of such importance to States, in particular island States, especially when that work was still at an early stage and concerned an emerging area of law in which State practice and *opinio juris* had not yet had time to become clearly established and in respect of which international law responses were urgently required.

46. France considered that the essential legal framework for issues related to the law of the sea was the United Nations Convention on the Law of the Sea. It was pleased that the Commission, in its initial work on issues related to the law of the sea, had recalled that fact, as well as the need to preserve the stability and security of regions affected by sea-level rise. France was of the opinion that the principles of stability, security, certainty and predictability, which were key underpinnings of the Convention, were equally relevant to the issue of sea-level rise. The Commission should therefore be guided by those principles when addressing issues related to the consequences of sea-level rise, especially in its work on the nature of baselines and on the status of islands, rocks and low-tide elevations.

47. The Commission should also attach particular importance to ensuring the consistency of its work on the topic, which gave rise to numerous questions in several areas of public international law, including human rights law and environmental law, as well as the law of the sea. The Commission had decided to successively examine the various issues, starting with the law of the sea and maritime delimitations. It was important to bear in mind that the final outcome of the Commission's work must provide a balanced and consistent synthesis of the issues considered, without one aspect taking precedence over another.

48. Turning to the topic "Succession of States in respect of State responsibility", he said that his delegation wished to congratulate the Commission for the progress made in its work and had taken note of its provisional adoption of draft articles 7, 8 and 9.

49. With regard to the topic "General principles of law", his delegation had taken note of the three draft conclusions provisionally adopted by the Commission. It encouraged the Commission, on that topic in particular, to take due account of the diversity of legal systems and to support the efforts of the Special Rapporteur in that regard. France continued to believe that the distinction between "les principes généraux *du* droit" and "les principes généraux *de* droit" remained an important issue and considered that the work of the Commission was a unique opportunity to clarify that distinction. It was therefore regrettable that draft conclusion 1 and the commentary thereto did not provide the expected legal clarification.

50. His delegation was puzzled to note that the Commission seemed to wish to recognize the existence of "general principles of law formed within the international legal system". In his delegation's view, general principles of law by definition had their origin in national legal systems, before being transposed to the international legal system. It did not therefore appear possible to recognize the existence of general principles of law directly formed within the international legal system. Rather, it seemed that they were rules of customary law, which was a distinct source of law.

51. **Mr. Hmoud** (Chair of the International Law Commission), referring to the comment by the representative of France concerning general principles of law formed within the international legal system, said that the Commission had in fact not yet recognized that category but was seeking the input of Member States before proceeding. As explained by the Chair of the Drafting Committee in her statement to the Commission at its seventy-second session, which was available on the Commission's website, the Commission and the Drafting Committee had decided not to consider draft conclusion 3 (Categories of general principles of law) but would return to it at a later stage when they could consider it together with draft conclusion 7 (Identification of general principles of law formed within the international legal system).

52. **Mr. Abdelaziz** (Egypt) said that his delegation's concerns regarding the topic "Immunity of State officials from foreign criminal jurisdiction" remained unchanged. The topic should be addressed cautiously, in such a way as to reflect *lex lata*, without introducing new legal rules. His delegation maintained its strong reservation regarding the exceptions to immunity *ratione materiae* listed in draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), which had been provisionally adopted by the Commission at its sixty-ninth session. As had been noted in the comments made by numerous Member States, those exceptions were inconsistent with customary international law.

53. With regard to draft article 8 ante (Application of Part Four), provisionally adopted by the Commission at its seventy-second session, his delegation continued to believe that it was important to reflect the distinction between immunity *ratione personae* and immunity *ratione materiae* in the procedural provisions and safeguards applicable to the draft articles contained in Part Two and Part Three of the draft articles; the two types of immunity were distinct in nature and applied to different categories of officials.

54. Concerning the other draft articles provisionally adopted by the Commission at its seventy-second session, his delegation welcomed the content of paragraph 2 of draft article 8 (Examination of immunity by the forum State), in which it was stated that the competent authorities of the forum State should always examine the question of immunity before initiating criminal proceedings and before taking coercive measures against a foreign official. In the interests of precision, it would be useful to specify that the forum State should determine the question of immunity, as opposed to merely examining it.

55. His delegation understood that the notification referred to in draft article 9 (Notification of the State of the official) should take place after the question of immunity had been determined in accordance with draft article 8. In order to prevent any confusion, it should be stated in paragraph 2 of draft article 9 that the notification should include the grounds on which it had been determined that immunity did not apply to the official. The wording of draft article 10 (Invocation of immunity) should make it clear that the default

assumption was that the foreign official enjoyed immunity and that such immunity had not been waived. In view of the need for a clear process governing the waiver of immunity, his delegation accepted the wording of draft article 11 (Waiver of immunity).

56. The wording of draft article 13 [9] (Determination of immunity) as proposed by the Special Rapporteur in her seventh report (A/CN.4/729), whereby it was for the courts of the forum State to determine the immunity of a foreign official, should be reconsidered; in its current form, its effects would be detrimental to relations among States.

57. Lastly, the Commission should approach the topic with great care in view of the considerable political sensitivities that could arise with regard to any topic involving international criminal law. It should not seek to expand on sources of law that did not enjoy universal consensus.

58. Turning to the topic "Sea-level rise in relation to international law", he said that the subtopic of issues related to the law of the sea was particularly important, as it involved such questions as the delimitation of maritime boundaries and baselines. His delegation believed that maritime limits should be fixed rather than ambulatory. Its reasons for holding that view included those set out by Mr. Cissé in his presentation on the practice of African States regarding maritime delimitation (A/76/10, paragraphs 259–261). Egypt supported the Study Group's plan of studying the sources of law and the principles and rules of international law, particularly the principles of *uti possidetis juris* and custom. It also underscored the importance of examining closely the positions of Member States as expressed in their comments and their statements before the Sixth Committee.

59. His delegation looked forward to the examination of issues related to the protection of persons affected by sea-level rise, which required a comprehensive approach including economic, social and cultural components.

60. **Mr. Evseenko** (Belarus) said that, as a number of delegations had pointed out, immunity of State officials from foreign criminal jurisdiction was a rule of customary international law. It stemmed from the principles of sovereign equality and non-interference in the internal affairs of States.

61. The sovereignty of States could be curtailed only in accordance with Chapter VII of the Charter of the United Nations. Under Article 103 of the Charter, States' obligations under the Charter prevailed over their obligations under any other international agreement. Consequently, the right of a State to invoke immunity could be denied or limited by another State only in accordance with a decision taken under Chapter VII of the Charter or if the State of the official had voluntarily waived the immunity of its official, either as a unilateral act or in accordance with an international treaty. A State could not take any actions, including criminal proceedings, that might affect the immunity of a foreign State official unless those conditions were met, as doing so could lead to abuses and could prejudice the assessment by other interested States of the actions of the State official in question, in violation of the principles of State sovereignty and non-interference in the internal affairs of a State. It would also run counter to the Charter. Chapter VII of the Charter was not always employed effectively to restrict the sovereignty of offender States with a view to restoring international peace and security. However, the usurpation of the functions of the Security Council by certain States, groups of States or international organizations, including by initiating criminal proceedings against officials of a State, in violation of that State's sovereignty, did even greater harm to international peace and security, gave rise to regional tensions and contributed to legal uncertainty and the fragmentation of international law.

62. Work on waivers to immunity should be done in tandem with the establishment of specific procedural conditions with a view to ensuring the observance of all the procedural safeguards that protected both States and individuals. Particular attention must be given not so much to protecting the human rights and procedural safeguards to which officials, just like any other accused persons, were entitled, as to preventing abuse by the State claiming jurisdiction. Even if some States were to agree on waivers of immunity, robust safeguards would be needed to prevent politically motivated proceedings and the abuse of jurisdiction.

63. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation believed it had greater implications for the law of the sea than for issues related to statehood. Although the consequences for a State's existence of the loss of all or some of its land territory was a matter of scholarly and practical interest, such situations were unlikely to arise in the near future. Furthermore, the Commission had already completed its work on the topic of protection of persons in the event of disasters, in which it had considered the situation of a State's land becoming completely submerged. However, the loss of territory would certainly raise questions regarding the determination of baselines for delimiting maritime zones. The Commission's work to identify and codify international

law in that respect could be useful for the development of practical recommendations for States aimed at regulating legal relations in connection with sea-level rise. His delegation believed that in determining the criteria for delimiting maritime zones to account for rising sea levels, the Study Group should base its work on the reports of the International Law Association's Committee on Baselines under the International Law of the Sea and Committee on International Law and Sea Level Rise.

64. Belarus shared the view that the United Nations Convention on the Law of the Sea was a key source for regulating matters related to the delimitation of maritime zones affected by sea-level rise. Other relevant rules of general international law should also be considered, however, including the principle that the land dominates the sea and the principle of freedom of the seas, the obligation to settle disputes peacefully and the protection of the rights of coastal States and non-coastal States.

65. As the mandate of the Study Group was limited to compiling a list of legal questions raised by sea-level rise and undertaking thematic studies, Belarus supported the view that it would be useful for a special rapporteur to consider the topic, with a view to concluding a set of draft articles that could be presented to States for the negotiation of a global framework convention on the legal consequences of sea-level rise.

66. **Ms. Flores Soto** (El Salvador), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction" said that draft article 8 ante, as provisionally adopted by the Commission, maintained a balance that respected the different legal systems and traditions of States and did not prejudge the adoption of specific procedural guarantees and safeguards. With regard to the discussion concerning the definition of the concept of "criminal jurisdiction", which was currently pending in the Drafting Committee, it might be useful for the Commission to analyse the contributions of Member States on that point, including those made by El Salvador during the seventy-first session of the General Assembly.

67. With regard to the draft articles proposed by the Special Rapporteur in her very clear, well-documented and comprehensive eighth report (A/CN.4/739), the Commission should take into account the fact that the sole purpose of draft article 18 was to distinguish between different legal regimes in order to preserve the validity of each and their distinct scopes of application. For that reason, her delegation agreed with the Special Rapporteur's recommendation that the provision should be included as draft article 3, paragraph 1, given that it was related to the scope of the draft articles.

68. As for draft article 17 (Settlement of disputes), the Commission might wish to clarify in the commentary thereto that the purpose of that provision was to finely balance the interests of the forum State and the State of the official. In that regard, it would be important to emphasize that, in accordance with the purposes and principles established in Articles 1 and 2 of the Charter of the United Nations, in particular with regard to the maintenance of international peace and security through the peaceful settlement of international disputes, and with a view to strengthening relations of coexistence and cooperation, the States members of the United Nations maintained full freedom to select whichever means of peaceful dispute settlement they preferred; no State could be forced to submit its disputes with other States to a means of peaceful dispute settlement to which it had not agreed. In order to ensure legal certainty in the exercise of the free choice of means, the Commission should therefore clarify, in the commentary to draft article 17, the importance of respect for and exercise of the free choice of means, without compulsion and without it implying the tacit acceptance of recourse to specific judicial means.

69. Lastly, her delegation was in favour of the inclusion of a reference to examples of good practices in the commentary to the draft articles.

70. Turning to the topic "Sea-level rise in relation to international law", she said that the Commission had reflected the needs of contemporary international society, including all relevant stakeholders, in its work and had brought together sufficient elements to evaluate the progressive development of various international instruments and, in particular, existing practice, in other words, international custom and other rules and principles of general international law. Sea-level rise should be recognized by the Commission as a scientifically proven fact, the implications of which were not limited to the law of the sea but extended to a wide range of other international law disciplines – including international environmental law and international human rights law, with an emphasis on the need to protect populations displaced by sea-level rise – that converged in a multidimensional analysis of the phenomenon and should be addressed by the Commission in the performance of its progressive development mandate. In its work on the topic, the Commission should therefore refer to other legal instruments relevant to the aforementioned areas of international law and, in analysing other sources of international law, it should consider other relevant rules of general international law, such as the principle of

good faith or the principle of *uti possidetis juris*, as well as State practice.

71. **Mr. Lefeber** (Netherlands), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that the law of immunities was very relevant to the Netherlands, given its role as a host State for many diplomatic missions and international organizations. In principle, therefore, it would strongly support the development of that law and was in the process of ratifying the United Nations Convention on Jurisdictional Immunities of States and Their Property, to which a treaty on the jurisdictional immunities of State officials would be a welcome complement. However, the Commission's current approach did not bode well for such a treaty. His Government was concerned at the application of the general rules of international law to specific issues addressed by the Commission in the context of the topic, demonstrating serious deficiencies in the conceptual underpinnings of the project, which was not only detrimental to general international law but undermined the clarity of the proposed rules on immunity presented by the Commission.

72. The distinction between primary obligations under the law of treaties and secondary obligations in the context of breaches of that law was blurred. That caused a lack of clarity with respect to the rules on dispute settlement, the nature of the provisions included and the extent to which they reflected obligations of conduct or were mere hortatory statements. If and when the draft articles became a treaty, the Netherlands would support a compromissory clause including compulsory dispute settlement, preferably at the International Court of Justice. However, such a dispute settlement mechanism could be used only to assess whether the States parties to the agreement had complied with their mutual primary obligations under the law of immunity and, for as long as those primary obligations were not clear, it seemed premature to discuss secondary norms. Furthermore, the primary obligations under the law of immunity must, at the very least, reflect the essence of the law of immunity, which was that immunity either applied or it did not, irrespective of whether it was invoked. When immunity applied, it could be waived, but there could be no obligation to waive it, since that would be tantamount to denying its application. With that in mind, his Government remained unconvinced by the approach currently taken with regard to the provisions on invocation of immunity and waiver of immunity. While it agreed that the question of whether immunities applied should be resolved at the earliest possible stage, it could not accept the consequences of that notion, as reflected in the draft articles, for the State of the official, especially in relation to dispute settlement. The State of the official must not be required to provide information to support the application of immunity in a given case, although it could choose to do so. Furthermore, it could not be held to be in breach of the law on immunity for not invoking immunity as soon as possible. On the basis of the presumption of immunity, the burden of proof lay with the forum State. Similarly, the decision to waive immunity was discretionary and could not be subject to dispute settlement.

73. In addition, the Commission sometimes reflected State practice as supporting a rule of customary international law, when in fact it might be mere practice and not reflect any obligation. For example, with regard to draft article 10 (Invocation of immunity), as provisionally adopted by the Commission, his delegation did not consider that State practice supported an obligation to invoke immunity in writing. As soon as the State of the official made clear its intention to invoke immunity, by whatever means, immunity must be considered to have been invoked. Furthermore, in light of the presumption of immunity, it was questionable whether the language used in the commentary to draft article 10, paragraph 2, reflected customary international law. The fact that there was *usus* in invoking immunity did not imply that States had the *opinio* that they must invoke such immunity in order to enjoy it. Rather, invocation confirmed a pre-existing condition. It therefore came as no surprise to his delegation that relevant treaties did not refer to invocation as a precondition.

74. The draft articles also did not reflect the general rules on obligations, in particular the rules on what constituted a binding obligation under international law, rules on circumstances precluding wrongfulness and rules on the termination, suspension and invalidity of obligations. The provision on the irrevocability of waivers in paragraph 5 of draft article 11, provisionally adopted by the Commission, should, for example, be deleted. A waiver must be express and it constituted a unilateral act of the State, binding the State of the official. While the forum State had a legitimate expectation that the act would be performed in good faith, it seemed obvious that a waiver could be withdrawn under certain circumstances, including a fundamental change of circumstances, as well as, in his delegation's view, when it was provided on the basis of fraudulent conduct of the forum State or under the threat or use of force.

75. His delegation would not support either the inclusion of a "without prejudice" clause on the issue of immunity before international criminal tribunals or the

inclusion of a list of international crimes in the draft articles. More detailed comments on those and other specific issues could be found in the annex to his written statement, available in the eStatements section of the *Journal*.

76. With regard to the important topic of sea-level rise in relation to international law, the Netherlands, a State comprising a low-lying coastal area in Europe and low-lying islands in the Caribbean, was guided by the notions of legal certainty, stability and security, remaining firmly grounded in the primacy of the United Nations Convention on the Law of the Sea. The topic raised many complex questions, some of which warranted further study. For example, the option of merely securing the outer limits of established maritime zones to prevent the loss of maritime zones as a result of sea-level rise had not been given much attention in the Commission's report and deserved more consideration. Nor did the current report contain much discussion on navigational safety and the potential dangers to navigation in the event that baselines were fixed. In that regard, his delegation welcomed the proposal made by the Co-Chairs to further study the issue of navigational charts, including the different functions of navigational charts as required under the rules of the International Hydrographic Organization and of the charts deposited with the Secretary-General for purposes of registration of maritime zones.

77. **Ms. Joyini** (South Africa) said that sea-level rise was a real and growing concern and every State in the world was likely to feel its effects, whether directly or indirectly. The Commission's work on the topic "Sea-level rise in relation to international law" was therefore both fitting and timely. The subtopics to be considered by the Study Group were all important and complex issues, with potentially significant consequences for all States. Bearing in mind that similar work on baselines was being carried out by the International Law Association, close consultation would be needed to avoid a fragmented approach.

78. Her delegation agreed that the mandate of the Study Group was to undertake a mapping exercise of the legal implications of sea-level rise and that it would not at present lead to the development of any specific guidelines or articles. It also agreed that, as suggested by some Commission members, it was important to distinguish between *lex lata*, *lex ferenda* and policy options. Notwithstanding the importance of the matter at hand, it would be premature to consider preparing a set of draft articles that could be presented to States for the negotiation of a global framework convention on the legal consequences of sea-level rise. Further analysis of sources of law, principles and rules of international law, practice and *opinio juris*, and navigational charts, as proposed by the Study Group, would greatly benefit further discussion on the topic. Given the far-reaching impact of sea-level rise, and notwithstanding the urgency attached to the topic, a considered approach must be taken, involving a comprehensive analysis of relevant law.

79. **Mr. Kapucu** (Turkey), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction" said that his delegation proposed amending draft article 11, paragraph 1, as provisionally adopted by the Commission, to include a reference to the consent of the State official. The paragraph would thus read: "The immunity from foreign criminal jurisdiction of the State official may be waived, with the consent of the State official, by her/his State". Furthermore, Turkey supported the deletion of paragraph 5 of draft article 11, which stated that waiver of immunity was irrevocable, given that, as indicated in the Commission's report, neither the relevant treaties nor the domestic laws of States had expressly referred to the irrevocability of waivers of immunity, and the practice on that issue was limited.

80. With regard to draft article 17, as proposed by the Special Rapporteur in her eighth report (A/CN.4/739), it would be more appropriate if the question of suspension were to be treated on a case-by-case basis by the court or arbitral tribunal in the context of provisional measures. It was also important to emphasize the need to ensure that domestic legal systems had provisions to give effect to any suspension.

81. Turning to the topic "Sea-level rise in relation to international law", he said that Turkey attached the utmost importance to climate change and its implications, as evidenced by its recent ratification of the Paris Agreement, and was determined to contribute more to global climate action efforts in close cooperation with its partners. Climate change-induced sea-level rise was already impacting the lives and livelihoods of millions around the world, especially in least-developed and small island States. Since countries were not able to combat the threat on equal terms, close international collaboration between all countries was necessary. Developed countries should provide developing countries with adequate financial and technical support, and share technology, best practices and know-how in climate adaptation and resilience-building.

82. As well as its social and humanitarian consequences, sea-level rise had the potential to create many legal issues. In particular, it might affect the final delimitation of areas where maritime boundaries had not

yet been delimited. His delegation therefore encouraged the Study Group to continue its consultations and discussions on the topic, including its legal dimensions, and analyse the inputs from the countries most affected by sea-level rise.

83. With regard to the upcoming election of the members of the Commission for the next quinquennium, Turkey had nominated Nilüfer Oral, Co-Chair of the Study Group on the topic, as a candidate for re-election to the Commission. With her wealth of experience and expertise in various fields of international law, she had already made invaluable contributions to the work of the Commission and, as one of the seven women who had served as members since its establishment, she had set a great example for other female candidates.

84. **Mr. Zanini** (Italy), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that, with regard to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), his delegation appreciated the "without prejudice" clause contained in draft article 18, which safeguarded the "speciality" of legal regimes establishing international criminal tribunals. At the same time, it recognized that those regimes were not insulated from general international law, including the rules on functional and personal immunities.

85. With regard to draft article 17, Italy saw the need to complement the provisions on exchange of information and consultation with a more traditional ex post facto dispute settlement clause. However, precisely because the proposal related to the phase of dispute settlement stricto sensu, his delegation recommended standardizing the drafting of paragraph 2 by replacing "may not exceed" with "shall not exceed" and "may suggest to the other party that the dispute be referred" with "may refer the dispute". Italy concurred with the inclusion of paragraph 3, which was in line with the need to avoid the aggravation of disputes and preserve the rights of the parties. At the same time, it recommended that the Drafting Committee add a qualifier to the effect that the obligation for the forum State to suspend the exercise of its jurisdiction was conditional upon the ascertainment of prima facie jurisdiction by the international tribunal, which normally took place in the course of incidental proceedings on provisional measures, in order to ensure that frivolous legal actions did not interfere with the course of justice at the domestic level.

86. His delegation would appreciate clarification from the Commission on the ultimate goal of the draft articles. It agreed with the Special Rapporteur that dispute settlement mechanisms were especially linked to treaty instruments and wished to recall that it was the Commission's standard practice to recommend that draft articles, unlike other outputs, be transformed into a treaty. His delegation also agreed with the decision of the Special Rapporteur not to formulate specific proposals on recommended good practices, given the existing time constraints and the diversity of views on the content, form and goals of such recommended practices.

87. Referring to the topic "Sea-level rise in relation to international law", he said that Italy was at the forefront of initiatives to address the issue of sea-level rise both domestically and through international cooperation. The Commission's study of some of the legal implications of sea-level rise was very timely. The limitations established in the syllabus prepared in 2018, in particular the assertion therein that modifications to existing international law, including the United Nations Convention on the Law of the Sea, would not be proposed, and the fact that the mapping exercise to be undertaken by the Study Group would not lead to the development of any specific guidelines or articles, should adequately address the concerns of some Member States that the Commission's work might have a destabilizing effect on the legal regime codified under the Convention. In that respect, his delegation wished to stress the importance of stability, security and legal certainty with regard to baselines and maritime delimitation. It fully concurred with the conclusion of the Co-Chairs of the Study Group that sea-level rise could not be invoked as a fundamental change of circumstances in relation to either existing delimitation agreements or arbitral or judicial decisions. It further underlined that any principle of permanency of baselines, established and deposited in accordance with international law, must refer solely to sea-level rise induced by climate change and not to other circumstances, including natural land accretion.

88. With regard to paragraph 171 of the first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1), the freedom of the high seas was subject not only to the requirement that it be exercised with "due regard" for the interests of other States and for the rights under the Convention with respect to activities in the Area, but also to the other conditions and limitations laid down by the Convention and customary international law, in accordance with article 87, paragraph 1, of the Convention.

89. **Mr. Xu** Chi (China), 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 the question of the inclusion of

draft article 17, which had the character of a special dispute settlement clause, required further discussion, given that dispute settlement clauses were generally only incorporated into legally binding instruments such as treaties and the Commission had not yet decided whether it would recommend to the General Assembly that the draft articles become a treaty. Moreover, the 6- or 12-month time limit on negotiations between States seemed to imply that if a negotiated solution had not been reached within that time limit, the parties concerned would need to submit the dispute to arbitration or judicial settlement. His delegation believed that such a provision might create difficulties for countries in practice.

90. With regard to draft article 18, it was his delegation's understanding that the topic under consideration concerned the immunity of an official of one State from the criminal jurisdiction of another State, which did not involve rules of immunity before international criminal tribunals. That understanding was confirmed in draft article 1 and the commentary thereto, as provisionally adopted by the Commission. The Commission should therefore carefully consider whether draft article 18 was necessary.

91. Many countries, including his own, had in recent years repeatedly expressed reservations about the content of draft article 7, which had been provisionally adopted by the Commission and was very controversial. China hoped that the Commission would take account of those reservations by re-examining the draft article, and the commentary thereto.

92. Concerning the topic "Sea-level rise in relation to international law", which was likely to have a substantive impact on the existing law of the sea regime and on the maritime rights and interests of States, his delegation appreciated the Study Group's contribution and had taken note of the joint oral report of the Co-Chairs on relevant progress. It believed that the Study Group should conduct its work in a more open and transparent manner, as suggested by some of its members, and that it should fully reflect national positions and concerns in order to ensure credibility and representativeness.

93. According to the Commission's report, the Study Group would examine other sources of law, in addition to the United Nations Convention on the Law of the Sea, including other international treaties and other principles and rules of international law, such as historic rights. Bearing in mind that the issue of sea-level rise had not been considered in negotiations on the Convention, China believed that it was appropriate to consider other sources of law. However, according to its mandate, the Study Group would not propose modifications to existing international law. Many countries believed that no uniform practice had formed among countries on the issue of sea-level rise. Furthermore, overemphasizing regional practice might aggravate the fragmentation of legal norms. The Commission should therefore be cautious and refrain from drawing conclusions lightly.

94. One country had already clearly made the request, in the Sixth Committee's discussions, that the work of the Commission should not involve the status of islands and rocks. However, in the first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1), the Co-Chairs of the Study Group had not only touched upon the determination of the status of islands and rocks but had considered issues of sovereignty such as the question of whether low-tide elevations could be claimed as territories and had even cited highly controversial arbitral rulings that were neither credible nor convincing. China believed that the Study Group should carefully manage its mandate, screening relevant references and citing them prudently.

95. Given that small island developing States and low-lying countries would bear the brunt of the potentially broad and profound global economic and social impacts of sea-level rise, the Commission's work should take into account the existential and development issues facing those countries and peoples. China stood ready to work together with other delegations to respond to the risks and challenges posed by sea-level rise in order to build a fair and just maritime order and protect the well-being of all.

96. **Mr. Simcock** (United States of America), speaking on the topic "Sea-level rise in relation to international law", said that his delegation appreciated the laudable efforts of the Study Group to find reliable solutions to the complex issues under consideration. The United States recognized that rising sea levels were a very real threat and was committed to working with others to promote the common goal of protecting maritime zones from challenge, in a manner consistent with international law. Noting that the Study Group intended to explore a range of additional sources of law on the matter of baselines and maritime zones, his delegation emphasized the universal and unified character of the United Nations Convention on the Law of the Sea. For example, under existing international law, as reflected in the Convention, coastal baselines were generally ambulatory, meaning that if the low-water line along the coast shifted either landward or seaward, such a shift might affect the outer limits of the coastal State's maritime zones. His delegation questioned whether other sources of law identified by

the Study Group could override or alter such universally accepted provisions. The United States remained supportive of efforts by States to delineate and publish their baselines and the limits of their maritime zones in accordance with international law, as reflected in the Convention. Such practice provided useful context and clarified the maritime claims of States, including with regard to future sea-level rise. His delegation welcomed further discussions on the steps that could be taken to protect States' interests in that regard, in accordance with international law.

97. Turning to the topic of "Immunity of State officials from foreign criminal jurisdiction", he said that his delegation wished to reiterate the concerns detailed in its prior statements before the Committee. In particular, it did not agree that draft article 7, provisionally adopted by the Commission, was supported by consistent State practice and *opinio juris*; as a result, it did not reflect customary international law. The Commission should aim to achieve consensus on the topic, given the sensitive issues involved and the importance of State practice. In addition, the prior reports on procedural aspects of immunity reflected significant methodological challenges, proposing provisions for certain procedures without the benefit of significant State practice. There was generally little visibility on criminal investigations that did not result in prosecutions brought by national authorities, whether for reasons of immunity or other factors, and case law in that area was sparse. As some of those provisions had now been provisionally adopted as draft articles, his delegation wished to underscore that they should not be viewed as codifying existing international law but, at best, as proposals for the development of law. The commentary should also reflect that understanding. Lastly, his delegation noted with concern that, in her eighth report (A/CN.4/739), the Special Rapporteur addressed the immunities of State representatives before international criminal tribunals, even while she recognized that such issues were clearly outside the Commission's mandate on the topic.

98. **Ms. Nir-Tal** (Israel), speaking on the topic "Sea-level rise in relation to international law", said that sea-level rise had potential far-reaching implications for the key underpinnings of the international legal order, including the principles of legal stability, security and predictability. Israel welcomed the Commission's discussion of the potential legal effects of sea-level rise on the preservation of baselines, maritime delimitation and islands. It reiterated its position that the work of the Commission and the Study Group on the topic should not undermine the delicate balance achieved by existing maritime border agreements, which meaningfully and significantly contributed to positive cooperation and to regional and international stability in both political and legal terms. In that regard, her delegation took note of the conflicting views in the Commission's report regarding the nature of baselines and maritime limits, including whether they were inherently ambulatory or should be considered as fixed. In the same context, it took note of the reference in the Commission's report to the 2018 conclusions of the Committee on International Law and Sea Level Rise of the International Law Association, according to which changes in land and maritime boundaries should not constitute a fundamental change of circumstances under article 62, paragraph 2, of the Vienna Convention on the Law of Treaties. Her Government continued to study that highly relevant issue at the interministerial level and looked forward to contributing to the debate at a future date.

99. Her delegation expected the Study Group to adopt a careful approach in light of the complex, multidisciplinary and multifaceted nature of the topic. It had concerns about a number of statements made in the issues paper, as well as regarding the methodology used by the Study Group. With regard to the references to the potential emergence of rules of customary international law, for example, it doubted whether any conclusion regarding evidence of existing binding rules of international law on the subject of sea-level rise could be drawn at the current juncture, given that, as the Study Group had acknowledged, there was limited State practice in that field. In that regard, Israel urged the Study Group to follow the methodology set out in the Commission's draft guidelines on the identification of customary international law. It also cautioned against reaching any conclusions on the topic from the mere fact that a given treaty was silent on a certain matter.

100. On the topic "Immunity of State officials from foreign criminal jurisdiction", she said that, while Israel attached great importance to ending impunity, the legal principle of immunity of State officials from foreign criminal jurisdiction was as important as ever; it was firmly established in the international legal system and had been developed to protect State sovereignty and equality, prevent international friction and political abuse of legal proceedings and allow State officials to perform their duties and conduct international relations properly and without impediment.

101. With regard to the draft articles provisionally adopted by the Commission to date, Israel remained concerned that some of those draft articles failed to reflect accurately the current state of customary international law and instead constituted suggestions for the possible progressive development of the law. If the Commission was indeed proposing such progressive

development, it should at the very least openly acknowledge that fact. Her delegation requested that its comments on the topic in previous years be considered together with the current statement.

102. On the issue of exceptions to immunity *ratione materiae*, Israel shared the view of other States and several members of the Commission that draft article 7 neither represented the current state of international law nor reflected any "trend" in that direction, as had recently been confirmed by a number of domestic courts, which had held that no such exception applied when officials acted in the course of performing their official duties. Israel therefore reiterated its position that draft article 7 should be deleted. Without prejudice to that position, it would expect the Commission, should it decide to retain draft article 7, to state clearly that it reflected a mere proposal for the progressive development of current law that States might or might not choose to adopt.

103. Furthermore, Israel once again requested the Commission to reconsider its approach on the issue of immunity *ratione personae*. While it was specified in draft articles 3 and 4 that only Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed such immunity, the category of high-ranking State officials enjoying immunity *ratione personae* was broader under customary international law, as reflected in the case law of the International Court of Justice and domestic courts. Again, if the Commission decided to retain those draft articles, it should make clear that they did not reflect customary international law.

104. Her delegation welcomed the progress made by the Commission with regard to the procedural safeguards discussed in the Special Rapporteur's seventh report (A/CN.4/729). In particular, as a result of the changes made to the wording of draft article 8, paragraph 2, to underline that the forum State should examine the question of immunity before initiating criminal proceedings or taking coercive measures that might affect an official of another State, it had now properly reflected the rule that immunity must be determined at the earliest possible stage, *in limine litis*. Israel also welcomed the deletion of the previous paragraph 4 of draft article 11, on deducing waivers of immunity from international treaties, as the text had been rife with difficulties and would have led to unwelcome ambiguity in that regard.

105. With regard to draft article 10, her delegation rejected the possible underlying assumption that the State of the official must invoke immunity in order for the question of immunity to be considered by the forum State. There should be a presumption of immunity in the case of foreign State officials unless the State of the official gave express notice of a lack of immunity or explicitly waived the official's immunity in writing, or until a clear determination of its absence was made. Israel thus maintained its view, as also expressed by several other Member States and some members of the Commission, that the invocation of immunity was not a prerequisite for its application, as immunity existed as a matter of customary international law. In addition, the requirement to invoke immunity in writing, as proposed in paragraph 2 of that draft article, did not necessarily reflect international practice, as the assertion of immunity could also be conveyed orally to the forum State. With reference to the paragraph 6 originally proposed by the Special Rapporteur concerning the examination proprio motu of the question of immunity, which had not been included in the draft article as provisionally adopted and was expected to be addressed at a later stage, Israel believed that no distinction should be made between immunity *ratione personae* and immunity *ratione materiae* in terms of the requirement to invoke immunity. Accordingly, her delegation, like some Commission members, maintained that, in cases where neither immunity *ratione personae* nor immunity *ratione materiae* was invoked, the forum State should still consider or determine proprio motu the question of immunity as soon as it became aware that a foreign official might be affected by the exercise of its criminal jurisdiction. Israel also maintained that the State of the foreign official was under no obligation to invoke immunity immediately upon becoming aware that criminal proceedings were being or could be taken against the official in question. After all, as the Special Rapporteur had acknowledged, and as was also implicit in paragraph 2 of draft article 12 [13], the State of the foreign official might need to consider various relevant issues prior to communicating its position on the matter.

106. With regard to the determination of immunity, the Commission should assert in draft article 13 [9], which had been proposed by the Special Rapporteur in her seventh report (A/CN.4/729) and had not yet been considered by the Drafting Committee, that immunity should be determined by the competent authorities of the forum State, which were not necessarily its courts. Although the prominence of the judiciary in determining issues of immunity prior to the initiation of criminal proceedings might reflect common practice in civil law systems, the draft article should also reflect the practice of other national systems, in which the executive branch played a leading role in determining such issues. Furthermore, issues of immunity, especially those pertaining to complementarity or subsidiarity, might be discussed by executive and prosecutorial authorities of the relevant States before the matter reached any court.

There should therefore be no unwelcome divergence from the current law and practice in terms of the temporal and procedural phases in which issues of immunity were considered and determined. Specific determinations regarding the immunity of foreign officials should be considered by decision makers in the forum State at the highest level and only after consultation with the State of the official, given that decisions on whether to institute a criminal investigation carried the risk of violating the official's immunity under customary international law. Bilateral consultations allowed the forum State to examine all relevant information, including issues of subsidiarity or complementarity, in a proper and thorough manner, thereby preserving the stability of international relations and the sovereign equality of States. Accordingly, proceedings must be suspended while consultations took place between the forum State and the State of the official, as several Commission members had previously articulated.

107. Israel believed that the justification provided by the Special Rapporteur for including draft article 18, relating to the issue of international criminal tribunals, as proposed in her eighth report (A/CN.4/739), was unconvincing. While the Special Rapporteur had argued that a specific draft article would be necessary in order to clarify that immunities before international criminal tribunals should be excluded from the scope of the draft articles and to ensure that the final outcome of the Commission's work on the topic did not undermine the rules of international criminal law, the title of the topic already referred to "foreign" jurisdiction and it was clearly stated in paragraph (6) of the commentary to draft article 1 that "the immunities enjoyed before international criminal tribunals, which are subject to their own legal regime, will remain outside the scope of the draft articles". In her delegation's view, draft article 18 was therefore redundant and might cause confusion; it should be omitted. If the Commission was nonetheless interested in including a "without prejudice" clause, the cited text from paragraph (6) of the commentary to draft article 1 could be incorporated into draft article 1 itself.

108. Given the broad agreement throughout the Commission's consideration of the topic that the issue of immunities before international criminal tribunals would remain outside the scope of the draft articles, it was appropriate that the Special Rapporteur had refrained from any detailed, comprehensive or critical assessment of that issue. It was therefore a matter of concern to her delegation that the Special Rapporteur had referred to the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case when presenting the text of the proposed draft article 18. That judgment included several unfounded and highly controversial propositions with which a significant number of States, including Israel, were in strong disagreement, including, but not limited to, the highly problematic proposition that there was no Head of State immunity from prosecution before international criminal tribunals under customary international law. Israel believed that determinations regarding the existence or lack thereof of immunity before international tribunals should be decided in accordance with the specific legal instrument under which each tribunal operated. Moreover, those instruments could not create any legal obligations for States not party to them without the explicit consent of those States. The Commission should refrain from including any reference to the highly controversial and widely criticized judgment in the *Jordan Referral re Al-Bashir* case in the commentary to the draft articles.

The meeting rose at 1 p.m.