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

Contents

21-15824 (E)

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

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

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

2. **Ms. Mangklatanakul** (Thailand), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that the right balance must be struck between according immunity to State officials from foreign criminal jurisdiction and ending impunity. The procedural safeguards and the provisions on the settlement of disputes contained in the draft articles on the topic should allow the Commission to finely balance the interests of the forum State and those of the State of the official in the determination and application of immunity.

3. Referring to the topic "Sea-level rise in relation to international law", she said that rising sea levels had revealed unprecedented legal, social and economic challenges in all aspects of life. For States to maintain peace, stability and friendly relations among themselves, their rights in relation to their maritime zones and boundaries, as guaranteed under the United Nations Convention on the Law of the Sea, must be protected. Maritime boundaries already established by treaties or adjudication should be final; they should not be affected by a fundamental change of circumstances.

4. Given that the legal uncertainty surrounding maritime boundaries or entitlements was likely to cause conflict and instability among neighbouring coastal States, the Commission should gather as much input from States as possible to be able to provide them with options for their consideration. Each region faced unique challenges caused by sea-level rise; the geography of coastlines varied; and the decision whether to use ambulatory baselines or not depended to a large extent on the general configuration of coastlines. As States might adopt different coastal protection measures to suit their specific conditions, the Commission should ensure that the voices of all States were heard, regardless of their size or level of development.

5. Her delegation hoped that the Commission would provide practical legal solutions to States, particularly the most affected developing States, while taking into consideration the work of other relevant forums on the topic.

6. **Mr. Rabe** (Côte d'Ivoire), referring to the topic of sea-level rise in relation to international law, said that rising sea levels, exacerbated by the effects of climate change, had disastrous implications for many countries, including coastal erosion, disappearance of human establishments, and the loss of land, farmland, resort infrastructure and human life. Côte d'Ivoire had adopted mitigation and adaptation measures to address the challenges posed by sea-level rise. It was a signatory to the Paris Agreement on climate change and had undertaken an ambitious programme to drastically reduce its carbon dioxide emissions and introduce renewable energies into its energy mix. It also ensured that local populations severely affected by the threat of sea-level rise were relocated to more secure sites.

7. His delegation supported the work of the Study Group on the topic and would like to seek the support of Member States for the candidacy of Yacouba Cissé, a member of the Study Group, for re-election to the Commission for its upcoming term. It was Mr. Cissé who had proposed the topic of prevention and repression of piracy and armed robbery at sea, which was on the Commission's long-term programme of work. His re-election would allow him to continue to contribute to many of the Commission's projects, in the interests of the international community.

8. **Mr. Nyanid** (Cameroon), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that immunity was, and should be, a derogation from ordinary law and a privilege allowing officials, by virtue of their status, to be exempt from the jurisdiction of another State. However, immunity from foreign criminal jurisdiction by no means eliminated the application of the principle of responsibility and the prevention of impunity for the most serious crimes of international law. Of course, persons enjoying immunity remained subjects of law, according to the terms set out in each State's legal and institutional framework. Immunity rested with States, which granted it to their officials to allow them to perform their duties as public servants with peace of mind. States themselves were not ordinary subjects of law; they were legal persons that acted through individuals and only they could lift that immunity.

9. In international law, immunity was the corollary of the principle of sovereign equality of States, a point reiterated vividly by the International Court of Justice in its judgment in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, when it stated that it "considers that the rule of State immunity […] derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the

fundamental principles of the international legal order." According to the maxim *par in parem non habet imperium*, one sovereign power could not exercise jurisdiction over another, a principle reiterated in article 5 of the United Nations Convention on Jurisdictional Immunities of States and Their Property and by the European Court of Human Rights in its judgment in *Ndayegamiye-Mporamazina v. Switzerland*.

10. His delegation was concerned about the adoption of draft articles on the current topic that would be seemingly geared towards establishing a new international law; that would undermine, attack and dismantle the foundations of international law, notably the expression of the consent of a State to be bound by conventions; or that, through sibylline provisions, would give certain organs the authority to create obligations for States against their will. Such dead-ending of the will of States was questionable and would represent the ultimate expression of the type of international power relationship that would violate Article 2, paragraphs 1 and 2, of the Charter and all resolutions related thereto. To give precedence to the jurisdiction of an international criminal tribunal over national courts would be contrary to the principle of complementarity. A provision on the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals should not create an exception to immunity that did not exist under customary international law. While some States could agree in their relations with one another not to recognize immunity, those States could not extend those rules to other States.

11. The jurisdictional immunity enjoyed by the officials of a foreign State was customary in nature and should be absolute. It followed that no State could judge another State, without its consent, for an act carried out in exercise of its sovereignty, in accordance with the maxim *par in parem non habet jurisdictionen*. Indeed, as was expressly indicated in article 38, paragraph 2, of the Vienna Convention on Diplomatic Relations and article 71 of the Vienna Convention on Consular Relations, a receiving State must not hinder the performance of the functions of diplomatic or consular posts. Because immunity from jurisdiction was an extension of the principle of sovereign equality of States, international subjects could not be subject to jurisdiction by another State. His delegation therefore dissociated itself from any clear attempt to progressively restrict that immunity.

12. The immunity enjoyed by senior officials in international law should be distinguished from immunity under domestic law. It should afford them broad protections, not only while they were in office, but also after they had left office. State officials should enjoy immunity *ratione materiae*, which protected them from foreign criminal jurisdiction for any act carried out in fulfilment of their official functions. Such immunity was functional, in that its effects pertained to official acts carried out on behalf of the State; it should not be limited to senior officials but should also extend to any official acting on behalf of the State, irrespective of rank.

13. Such immunity afforded significant protections to individuals acting in an official capacity, because official acts were considered to have been performed by the State and not by the official. Immunity r*atione materiae* prevented foreign courts from circumventing the immunity of States, because they could not hold a State official responsible for an act for which the State, which itself enjoyed immunity, should not be held accountable. Without functional immunities, courts could exercise indirect control over the acts of another State by prosecuting an official who had acted on that State's behalf.

14. For senior State officials, immunity *ratione materiae*, which applied when they were in office, was even more important after they had left office. While in office, the officials were in any event covered by immunity *ratione personae*, which extended to all of their acts. A former senior official therefore should not be prosecuted for an official act committed while in office, because immunity *ratione materiae* attached to the function of the official and not to his or her official status. Unlike official status, which disappeared at the end of the term of office, the act remained attributable to the State even after the official had ceased to act on the State's behalf. Moreover, senior officials also benefited from inviolability, or immunity from any coercive measures. They could, nevertheless, be prosecuted by the sending State, or by the forum State if the sending State waived immunity. However, given that immunity existed for its benefit, only the sending State could decide to waive it in the manner set forth in article 32, paragraph 1, of the Vienna Convention on Diplomatic Relations and article 41, paragraph 1, of the Vienna Convention on Special Missions.

15. The immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs – the so-called troika – was particularly important. The immunity of the Head of State derived from the principle of *par in parem non habet imperium*: no sovereign could judge another, as the two figures were on an equal footing. Such immunity should be extended to the two other members of the troika, their functions having come to assume an importance equivalent to that of the Head of State, as the International Court of Justice

had recognized in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* cases.

16. Moreover, as was shown by State practice and had been recognized by the Court in *Arrest Warrant*, Heads of Government and Ministers for Foreign Affairs had been customarily granted the same immunity as Heads of State. His delegation's view was that the *ratio legis* for the immunity of senior officials lay in their functions. In *Arrest Warrant*, the Court had invoked functional grounds to justify extending the immunity of senior State officials to the Minister for Foreign Affairs, solely on the grounds that the Minister needed to be protected in order to properly fulfil his or her functions.

17. Article 21 of the Vienna Convention on Special Missions applied directly to State officials of high rank and granted immunities and other privileges to special missions and their members. By contrast, even though the Vienna Convention on Diplomatic Relations did not pertain to State officials of high rank directly, since those officials were hierarchically superior to diplomats, the Convention should be applied by analogy based on an interpretation a *maiore ad minus*. The Convention on Jurisdictional Immunities of States and Their Property extended the immunity of States to that of their officials when acting in their official capacity. It was stated in article 3, paragraph 2, of the Convention, which did not deal with immunity *rationae personae*, that the Convention was without prejudice to privileges and immunities accorded under international law to Heads of State *ratione personae*.

18. International law was built on a fundamental contradiction, since it attempted to organize the necessary interdependence of States while preserving their independence. Unlike domestic law, which was based on a hierarchical model with a distinction between the governors and the governed, international law was built on a model that was intrinsically void of hierarchy and where only sovereignty mattered. There was no international legislator, because there was no central law-making organ to establish general rules that were binding on all. It was therefore important to make a clear and unequivocal distinction between national courts and international tribunals. Consequently, his delegation rejected the idea of hybrid tribunals and found the proposal to refer to "internationalized criminal tribunals" rather than "international criminal tribunals" inappropriate.

19. Concerning the draft articles provisionally adopted so far by the Commission, contained in document A/76/10, his delegation wished that the criteria he outlined above would be reflected in draft articles 3 and 4. Immunity *ratione personae* for senior officials pertained to their status, rather than to the nature of the action in question. The officials should therefore be covered for all acts they performed. The International Court of Justice had consistently held that senior State officials had absolute immunity from criminal jurisdiction while fulfilling their functions. Such immunity was also enshrined in article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations and of the Vienna Convention on Special Missions. His delegation wished to see those developments reflected in draft articles 5, 6 and 7.

20. With regard to draft article 8 (Examination of immunity by the forum State), his delegation believed that when the competent authorities of the forum State became aware that an official of another State might be affected by the exercise of their criminal jurisdiction, they should only consider criminal proceedings after the said immunity had been lifted, and should promptly cease any criminal proceedings or coercive measures that might affect the official, including those that might affect any inviolability that the official might enjoy under international law.

21. Concerning draft article 9 (Notification of the State of the official), for the sake of consistency with draft article 11, which stated clearly that only the State could waive the immunity from foreign jurisdiction of its officials and that said waiver must always be express and in writing, the competent authorities of the forum State who wished to initiate criminal proceedings or take coercive measures against an official of another State should not merely have to notify the State of said circumstance. They must also require and obtain the express consent of that State, as a minimum courtesy between subjects of international law.

22. Referring to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), he said that draft article 18, which indicated that immunity before an international criminal tribunal was governed by the instrument establishing the tribunal in question, was inoperative, because it destroyed the very foundation of international law, in cases where accession to said instrument was not universal. The reference not only to the "rules" but also to the "practices" governing the functioning of international criminal tribunals was inadmissible, just like the inclusion of an explicit reference to obligations resulting from decisions of the Security Council. As stated in Article 24 of the Charter of the United Nations, the Security Council had responsibility for the maintenance of international peace and security, and in discharging those duties the Council should act in accordance with

the purposes and principles of the United Nations. An unequivocal connection between respect for immunity and the maintenance of peace therefore remained to be established.

23. His delegation was concerned about the excessively broad and murky scope of the rules contemplated in the draft article and would prefer the following wording: "The present draft articles take into consideration the application of immunity before international criminal tribunals. That immunity must be taken into consideration in the constitutive instruments of said tribunals".

24. With respect to the title of draft article 17 (Settlement of disputes), "Procedural requirements" would be more appropriate for the provision, because "settlement of disputes" suggested the creation of a binding obligation on States. It was also not appropriate to include a dispute settlement clause in the draft articles, given that such clause would limit the exercise of criminal jurisdiction by States. In addition to negotiation, arbitration and judicial settlement, the other means of peaceful settlement of disputes set forth in Article 33 of the Charter should be mentioned, to better align the provision with the practice of States.

25. It was also important to highlight the obligation of all States under Article 2, paragraph 3, and Article 33 of the Charter to settle any differences between them by peaceful means, as well as the importance of the freedom of States to choose the means of dispute resolution. His delegation supported the suggestion that an additional paragraph making express reference to the principle could be incorporated in the draft article. In any event, the focus should be on the freedom of choice of means that States had, rather than on the violation of that freedom. His delegation supported the proposal to amend paragraph 1 by adding the phrase "through any other means of their own choosing" after "negotiations". It was also of the opinion that the expression "as soon as possible" should be changed to "as soon as practicable", to allow States an appropriate degree of flexibility.

26. Referring to the topic of sea-level rise in relation to international law, he said that his delegation encouraged the Study Group on the topic to continue working in a prudent manner, taking into consideration known sociological and legal contingencies and constraints, in order to maintain the necessary level of legal certainty.

27. **Mr. Mainero** (Argentina), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that since there was no international treaty of universal character that regulated all questions relating to the immunity of State officials from foreign criminal jurisdiction, the Commission's work on the topic was highly relevant, as it would help to identify possible customary rules and trends in State practice. The establishment of international rules concerning jurisdictional immunities was critical for the peaceful conduct of inter-State relations. If foreign State officials did not enjoy some level of protection before the receiving State, they would be vulnerable to pressure and coercion, which would affect the free performance of their functions. While in general the jurisdiction that a State exercised in its own territory was absolute, under international law, that territorial sovereignty was limited by the immunity of a foreign State and its officials. From that perspective, immunity helped to maintain the principle of sovereign equality of States.

28. The evolution and consolidation of international criminal law had generated a debate concerning the nexus between the rules of that branch of international law and the conventional rules relating to jurisdictional immunities, as some of the principles and rules that applied in those normative frameworks seemed to be mutually exclusive. Despite the diverse positions adopted by domestic courts on the matter, his delegation believed that it was possible to identify a trend in favour of an exception to immunity based on the commission of international crimes for cases where functional immunity was invoked. It therefore supported the Commission's approach with regard to draft article 7, which it had provisionally adopted.

29. Referring to the issues raised by the Special Rapporteur in her eighth report (A/CN.4/739), he said that the scope of the Commission's work on the topic was limited to the immunity of State officials from the criminal jurisdiction of another State and did not extend to the jurisdiction that international criminal tribunals might exercise. It was important, however, to have clarity on the two areas, which were governed by different rules. His delegation therefore agreed with the formulation in the Special Rapporteur's proposed draft article 18 that the draft articles were without prejudice to the rules governing the functioning of international criminal tribunals, because the regime of immunity before international criminal tribunals had developed differently from the corresponding regime before national courts.

30. While immunity might appear to be a purely legal issue, it did give rise to political sensitivities that affected inter-State relations. Examples of situations of diplomatic tension between States arising from matters related to the immunity of their officials were legion, and the International Court of Justice had adjudicated various cases concerning the immunity of State

officials. It was therefore appropriate for the Commission to contemplate the existence of a regime for the peaceful settlement of disputes between States, as the Special Rapporteur proposed in draft article 17.

31. Turning to the topic of sea-level rise in relation to international law, he said that rising sea levels represented one of the greatest threats to the survival and growth prospects of many small island developing States. Given the complexity and diversity of the legal issues involved, the Commission should continue to consider the topic in detail, taking into consideration the comments and practices of States as well as international jurisprudence.

32. Various international law instruments contained relevant provisions relating to sea-level rise and its impacts. The United Nations Convention on the Law of the Sea constituted the framework within which all activities in the oceans and seas must be carried out. In that connection, the starting point for the measurement of maritime spaces subject to national jurisdiction was the baseline, the normal of which was the low-water line along the coast. With respect to the effects of sea-level rise on the boundaries of maritime spaces, if the baselines and the outer limits of the maritime spaces of a coastal or an archipelagic State had been properly determined in accordance with the Convention, which also reflected customary international law, those baselines and outer limits should not be required to be readjusted should sea-level changes affect the geographical reality of the coastline.

33. It was clear from international jurisprudence and the works of distinguished jurists that the concept of fundamental change of circumstances (*rebus sic stantibus*) did not apply to border treaties as established in article 62 of the Vienna Convention on the Law of Treaties. That position was confirmed by the International Court of Justice in the *Aegean Sea Continental Shelf (Greece v. Turkey)* case, and by the Arbitral Tribunal of the Permanent Court of Arbitration in its award in the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*. In the latter case, the Tribunal had pointed out that "maritime delimitations, like land boundaries, must be stable and definitive to ensure a peaceful relationship between the States concerned in the long term" […] and that "[i]n the view of the Tribunal, neither the prospect of climate change nor its possible effects can jeopardize the large number of settled maritime boundaries throughout the world. This applies equally to maritime boundaries agreed between States and to those established through international adjudication".

34. The International Law Association had also conducted a study in which it had recommended an interpretation of the United Nations Convention on the Law of the Sea that favoured the preservation of rights over maritime spaces, indicating that the question of the impact of sea-level rise on borders should be considered much more broadly, given the importance of the principles of certainty and stability in treaties, in particular those concerning international limits and boundaries. Those principles were reflected in a variety of international treaty regimes and in jurisprudence.

35. **Mr. Sarufa** (Papua New Guinea), referring to the topic of sea-level rise in relation to international law, said that given the ongoing impact of rising sea levels on coastlines and maritime features, the relationship between sea-level rise and maritime zones under the United Nations Convention on the Law of the Sea was of fundamental concern to his delegation. The Convention set out the legal framework within which all activities in the oceans and seas must be carried out. It imposed no affirmative obligation to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General. His delegation recognized the principles of legal stability, security, certainty and predictability that underpinned the Convention and the relevance of those principles to the interpretation and application of the Convention in the context of sea-level rise and climate change. For his delegation, "legal stability" meant the need to preserve the baselines and outer limits of maritime zones.

36. Papua New Guinea was pleased with the interest that the international community had shown in the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise issued by the leaders of the Pacific Islands Forum on 6 August 2021. The Declaration was firmly grounded in the primacy of the United Nations Convention on the Law of the Sea as the enduring legal order for the oceans and seas, and was intended as a formal statement of their view on the application of the rules of the Convention in the face of climate change-related sea-level rise. In the Declaration, the leaders had proclaimed that the maritime zones of the members of the Forum, as established and notified to the Secretary-General in accordance with the Convention, and the rights and entitlements that flowed from them, should continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.

37. It was the view of Papua New Guinea that the proclamation and the current and intended future State practice in its region were supported by both the Convention and the legal principles underpinning it.

Furthermore, preserving maritime zones in the manner set out in the Declaration would contribute to the formulation of a just international response to climate change-related sea-level rise.

38. His delegation welcomed and supported the call by the Commission on States and others to provide, before the end of the year, practices and other relevant information on issues related to statehood, as well as issues related to the protection of persons affected by sea-level rise. It was working together with other Pacific Islands Forum delegations to make a joint submission to the Commission.

39. **Mr. Ndoye** (Senegal), addressing the topic "Immunity of State officials from foreign criminal jurisdiction", said that the work of the Commission should not be based on a single doctrinal approach emanating from a single legal culture and expressed in a single language. The Commission's future and the uptake of its work by States would depend on its ability to anchor that work on the diversity of practices, cultures, opinions and judicial systems in the world. The elaboration of international conventions on the basis of any draft articles on the topic remained strongly dependent on its ability to incorporate all international legal systems into its work. It was therefore necessary to take into full consideration the composition of the Commission, which should be reflective of geographical diversity and of the major legal systems in the world.

40. As a staunch combatant against impunity, Senegal attached vital importance to the immunity of State officials from foreign criminal jurisdiction and remained committed to strengthening the rule of law at the international level. In that connection, it welcomed the judgment of the International Court of Justice in the *Arrest Warrant* case, in which the Court had explicitly enshrined the principle of the immunity of State officials from foreign criminal jurisdiction. His delegation also welcomed the codification of the Court's jurisprudence in article 3 of the draft articles provisionally adopted so far by the Commission, in which the personal immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs was recognized.

41. His delegation noted with regret, however, that significant progress had not been made on the draft articles for several years. Without wanting to criticize the work of the Commission, his delegation called on the Commission to bring clarity to some aspects of the question. Despite the differences of opinion among States, Senegal remained favourable to the elaboration of an international legal instrument to effectively prevent and suppress the most serious international crimes.

42. His delegation reiterated its unwavering commitment to the idea of discussing in a consensual manner and setting up an international legal framework which all States could endorse to effectively combat impunity for the perpetrators of mass atrocities. It called on all States to join the mutual legal assistance initiative, aimed at the adoption of a new multilateral treaty on mutual legal assistance and extradition for the national prosecution of the most serious international crimes.

43. Lastly, it was important to continue the debate on the draft articles on immunity of State officials from foreign criminal jurisdiction in a detailed, sincere and transparent manner. The common goal to combat impunity for the perpetrators of the most serious crimes as a moral responsibility of the international community required a coordinated approach that transcended the political differences among States.

44. **Mr. Tichy** (Austria), referring to the topic "Immunity of State officials from foreign criminal jurisdiction" and the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), said that since it was his delegation's position that the Commission should continue to prepare draft articles on the topic and that they should lead to a convention, it supported article 17 (Settlement of disputes), which was a necessary complement to the other procedural safeguards proposed by the Special Rapporteur. However, regardless of the nature of the final outcome of the Commission's work on the topic, his delegation would prefer stronger, unequivocal wording for such a provision. It therefore suggested that it be stated in the draft article that if differences between the forum State and the State of the official remained even after negotiations, the dispute "shall" be referred to the International Court of Justice or to arbitration.

45. With regard to paragraph 3 of the draft article, it was unclear why the forum State should only suspend the exercise of its jurisdiction if the dispute was referred to a judicial organ. It would be more appropriate to suspend the national proceedings from the moment when the parties started their endeavour to resolve the dispute through negotiations or any other means of international dispute settlement. It would also be helpful if more guidance was provided in the draft article as to the timelines for a rapid dispute settlement proceeding and the consequences of such a proceeding for the individual concerned.

46. As to the relationship between the draft articles and international criminal tribunals, his delegation welcomed the Special Rapporteur's proposal to include in draft article 18 a "without prejudice" clause that settled any doubts about the scope of the current draft

articles. It concurred with the view that the legal regimes governing the functioning of international criminal tribunals were independent of and separate from those governing national criminal courts. However, the Commission should clarify the meaning of the term "international criminal tribunals" used in the draft article, indicating whether and to what extent the term also encompassed hybrid or internationalized criminal tribunals.

47. There was a proposal presented in the Commission's report (A/76/10) to refine the text of the draft article to read: "[t]he present draft articles are without prejudice to the applicability of immunity before international criminal tribunals under the relevant constituent instruments establishing such international criminal tribunals." His delegation was not in favour of such wording, as the irrelevance of an official capacity before an international tribunal should be expressed in terms of a non-existing exemption from jurisdiction and not as immunity.

48. Referring to the draft articles provisionally adopted so far by the Commission, in particular draft articles 8 ante and 8, he said that issues of immunity from criminal jurisdiction might also arise in the context of administrative acts and proceedings. Therefore, the terms "criminal proceeding" and "criminal jurisdiction" must be understood to also include administrative criminal proceedings. In addition, there was a possible inconsistency concerning the term "criminal proceeding" in those two draft articles. In the commentary to draft article 8 ante, the Commission stated that the term included "both acts of the executive and acts performed by judges and prosecutors", while in the commentary to draft article 8, it explained that "'criminal proceedings' refers to the commencement of judicial proceedings brought for the purpose of determining the possible criminal responsibility of an individual". His delegation recommended that the broader understanding of "criminal proceedings", comprising also acts of the executive, be maintained throughout the commentaries.

49. Concerning draft article 9 (Notification of the State of the official), his delegation agreed that the notification must be provided at an early stage. However, there might be circumstances in which a notification, before coercive measures were taken, was not possible or feasible, for reasons involving the effectiveness of criminal proceedings. His delegation would prefer to use the wording "shall promptly notify", drawing inspiration from article 42 of the Vienna Convention on Consular Relations. With regard to paragraph 3 of the draft article, his delegation welcomed the fact that diplomatic channels were now contemplated as the primary means for the communication of the notification.

50. As to the structure of the draft article, his delegation proposed that paragraphs 2 and 3 switch places, since paragraphs 1 and 3 were very much related. Additionally, the second sentence of paragraph 1 could be deleted in light of paragraph 3. With regard to draft article 10 (Invocation of immunity), his delegation welcomed the fact that the Commission had taken note of the comment of States that the invocation of immunity was a matter of discretion for the State of the official, and the fact that the Commission had left the questions of the competent authority for the invocation and the waiving of immunity to the domestic law of the State concerned.

51. With regard to draft article 11 (Waiver of immunity), it was noteworthy that the Commission had not found it necessary to include criteria for the content of the waiver, noting in paragraph (11) of its commentary to the draft article that "the content of the waiver should be clear enough to enable the State before whose authorities it is submitted to identify the scope of the waiver without ambiguity". A normative determination to that effect should be included in the text of the draft article.

52. On draft article 12 [13] (Requests for information), his delegation suggested adding a temporal condition to the stipulation in paragraph 4, which could read: "The requested State shall consider any request for information promptly and in good faith."

53. Turning to the topic of sea-level rise in relation to international law, he said that, given the contentious discussions that had arisen from the first issues paper presented by the Study Group on the topic (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1), his delegation shared the concern that papers and outcomes of study groups, just like reports of Special Rapporteurs, might be mistakenly referred to as products of the Commission. While that might indeed be "a recurring problem", as stated in paragraph 265 of the Commission's report (A/76/10), Austria hoped that the Commission, and in particular the current Study Group, would take measures to prevent such confusion in the future.

54. As to the specific issues addressed in the issues paper, there was indeed a need for a more encompassing, in-depth analysis of the core question as to whether baselines were to be regarded as ambulatory or permanent. The same was true of the effect of sea-level rise on the extension of the exclusive economic zone and the continental shelf. Austria would also welcome further study in regard to the applicability of article 62

of the Vienna Convention on the Law of Treaties to the phenomenon of sea-level rise.

55. His delegation would seek clarification about the overall aim and purpose of the future work of the Study Group, in particular, whether the Study Group intended to merely study the *lex lata*, or whether, and if so to what extent, it aimed to propose changes to the existing legal framework.

56. **Mr. Doh** Kwangheon (Republic of Korea), referring to the topic of immunity of State officials from foreign criminal jurisdiction, said that it was important for the Commission to address States' concerns and find an appropriate consensus amongst the diverse views before completing its first reading. His delegation was grateful to the Commission for its efforts to shed light on some procedural aspects of the exercise of criminal jurisdiction against officials of another State.

57. Referring to the draft articles provisionally adopted so far by the Commission, he said that his delegation welcomed the decision by the Drafting Committee to use, in draft articles 8 and 9, general terminology such as "initiation of criminal proceedings" or "coercive measures", instead of legal terminology specific to individual legal systems. It also welcomed the Commission's decision not to identify the authorities with the power to make decisions relating to the waiver of immunity. Given the diverse range of forms of procedural systems in the world, it would be helpful for the Commission to clarify, at an appropriate time, key terms used in the draft articles, such as "criminal jurisdiction" and "criminal proceedings".

58. The concept of "criminal jurisdiction", which had been discussed in the Special Rapporteur's second report (A/CN.4/661), had not yet been considered by the Drafting Committee. Although in its commentary to draft article 8 the Commission referred to "governmental, police, investigative and prosecutorial acts" as potentially falling within the scope of the exercise of "criminal jurisdiction", the Commission should identify the threshold by which a particular governmental action could be construed as an "exercise of criminal jurisdiction". Also, even though the expression "criminal proceedings" referred to in the commentary as "commencement of judicial proceedings" did to some extent clarify its meaning, a clearer definition of "proceedings" would be of great value.

59. It seemed the Commission intended to have the provision of draft article 8 ante apply generally to other provisions of the draft articles. However, as it stated in its commentary, there were different views within the Commission concerning the scope of Part Four. Accordingly, his delegation humbly requested that the Commission further review and discuss whether the draft article was fully apt as currently drafted.

60. Turning to the topic of sea-level rise in relation to international law, he said that his delegation welcomed the meaningful progress made by the Study Group, but given the sensitivity and complexity of the topic, humbly requested that the Study Group deliberate further on the themes presented by its Co-Chairs.

61. Lastly, the Republic of Korea would like to seek the support of Member States for the candidacy of Keun-Gwan Lee for election to the Commission for its upcoming term.

62. **Mr. Fifield** (Australia), addressing the topic "Sea-level rise in relation to international law", said that Australia steadfastly supported the United Nations Convention on the Law of the Sea, which reflected its commitment to an international rules-based order, as the basis for international stability and prosperity. The Convention also provided the legal framework within which all activities in the oceans and seas must be carried out. As a member of the Pacific community, Australia commended the Commission and States for the attention they continued to give to sea-level rise, an issue that posed significant developmental, economic and environmental challenges and whose impacts would be felt by all States in one way or another.

63. His delegation encouraged the Commission and all States to take note of 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. In the Declaration, the leaders had recognized the need to preserve maritime zones to the greatest extent possible, as well as the principles of legal stability, security, certainty and predictability underpinning the United Nations Convention on the Law of the Sea. Australia was committed to working together with all States to preserve maritime zones and the rights and entitlements that flowed from them, and to secure the livelihoods of future generations in a manner that was consistent with international law.

64. Referring to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that his delegation welcomed the Commission's continued discussion of the procedural aspects of such immunity. With regard to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), it invited the Commission to further elaborate and clarify the rationale for draft article 18, which was formulated as a "without prejudice" clause, whereas draft article 1 provisionally adopted by the Commission already contained such a clause. In addition, in its commentary

to draft article 18, the Commission made it clear that any question of immunity before international criminal tribunals was outside the scope of the current topic, and that the rules governing immunity before such tribunals were to be affected by the content of the draft articles.

65. Australia also invited the Commission to clarify how draft article 17 (Settlement of disputes) would operate in practice, particularly in the light of the wording that States "may suggest" referral of a dispute to arbitration or to the International Court of Justice.

66. His delegation welcomed the Commission's efforts in drafting commentaries to drafts articles 8 ante, 8, 9, 10, 11 and 12, which it had provisionally adopted. It would be helpful if, in its commentaries, the Commission could make a clearer distinction between where it sought to codify an existing rule of customary international law and where it was engaged in progressive development of the law. Where the Commission's intention was codification, it should identify more clearly the relevant State practice and *opinio juris* in support of the draft article.

67. In that connection, Australia maintained its position that the proposed exceptions to immunity *rationae materiae* in draft article 7 provisionally adopted so far by the Commission did not reflect any real trend in State practice, still less existing customary international law. It shared the doubt that the use of procedural safeguards could sufficiently rectify the substantive flaws inherent in the draft article. His delegation invited the Commission to address States' concerns with respect to the draft article, including by identifying it as progressive development of the law, before the completion of the first reading of the current draft articles.

68. **Mr. Sakowicz** (Poland), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that his delegation took note of the draft articles provisionally adopted so far by the Commission, and welcomed the fact that the Commission had streamlined the proposals contained in the Special Rapporteur's seventh report (A/CN.4/729). Part Four of those draft articles contained important procedural guarantees and safeguards to help ensure genuine, good-faith consultation and cooperation between the State of the official and the forum State.

69. Poland also took note of draft articles 17 and 18 proposed by the Special Rapporteur in her eighth report (A/CN.4/739). Both provisions were useful and had merit. Acknowledging the relationship between the immunity of State officials from foreign criminal jurisdiction and the rules governing the functioning of international criminal tribunals needed not be prejudicial to the topic per se. In the current case, declaring the autonomy of the applicable legal regimes seemed reasonable. With regard to draft article 17 (Settlement of disputes), there was no need for it to contain all the means of peaceful dispute settlement contained in Article 33 of the Charter. The minimalism and straightforwardness of the proposed approach could indeed be considered a virtue.

70. Turning to the topic "Sea-level rise in relation to international law", he said that the Commission's decision to use a deliberately tailored Study Group on the topic with two Co-Chairs resulted in a hybrid between the Special Rapporteur format and traditional study groups. His delegation would continue to observe with interest whether such a process was beneficial and could be used as a model for future work by the Commission.

71. Unavoidable sea-level rise and the need to understand its consequences raised a number of questions relevant to international law, in particular the interpretation of several provisions of the United Nations Convention on the Law of the Sea and possible identification of customary law in that respect, and article 62, paragraph 2, of the Vienna Convention on the Law of Treaties, which was intended to ensure the certainty and stability of treaties delimiting areas under some kind of State authority. Nonetheless, there was no need at the current time to prepare draft articles on the topic; an upgraded Study Group's report was an optimal outcome of the Commission's work. As the report of the Study Group could have practical implications for State practice, the Commission should be transparent in its work, making a clear distinction between *lex lata*, *lex ferenda* and policy options in its proposals.

72. **Mr. Pildegovičs** (Latvia), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that the Commission should make every effort to follow the Special Rapporteur's suggestion to adopt the draft articles on the topic on first reading in 2022, to allow States to reflect upon and comment on a full set of draft articles in the usual space of two years. That would allow the newly elected Commission to start the second reading in 2024. Latvia agreed with the general point made by the Special Rapporteur as to the importance of clarifying the relationship between the topic under consideration and international criminal tribunals.

73. Much of the discussion on the settlement of disputes, as presented by the Special Rapporteur in her eighth report (A/CN.4/739), would depend on the final form of the Commission's work. If that form were to be draft articles for a possible convention, Latvia would

encourage the Commission to adopt rules that reflected the leading role of the International Court of Justice in dispute settlement. It could draw inspiration from the so-called opt-out procedure provided for in article 15 of the draft articles on prevention and punishment of crimes against humanity and article 27 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. His delegation also agreed with the Special Rapporteur that there was no need to formulate specific proposals with respect to recommended good practices.

74. Turning to the topic "Sea-level rise in relation to international law", he said that rising sea levels were of direct interest to Latvia, a coastal State. The first issues paper from the Study Group (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) had prompted a number of important questions relevant to international law, including the sources and interpretation of international law, the role of States and groups of States in changing international law, the connection between sea-level rise and key concepts of the law of the sea reflected in the United Nations Convention on the Law of the Sea, and the impact of sea-level rise on navigational practicalities such as charts. It might appear suboptimal to some delegations, however, that the Commission, having raised those key questions and stimulated the broader discussion, did not seem to have any plan to return to them before 2023 at the earliest. If the schedule of the next session permitted, Latvia would encourage the Commission to continue the discussion of sea-level rise in relation to the law of the sea in 2022.

75. Latvia had also taken note of the Study Group's intention to prepare a second issues paper relating to statehood and to the protection of persons affected by sea-level rise. In light of its experience of continued statehood since its founding in 1918 and its membership of the League of Nations, Latvia endorsed the view that factual control over territory was not always a necessary criterion for the continued juridical existence of States. It would be keeping a close eye on how State practice was addressed in that issues paper.

76. **Mr. Matea** (Solomon Islands), referring to the topic of sea-level rise in relation to international law, said that, like other small island developing States, Solomon Islands was particularly affected by climate change and sea-level rise, with over half of its population living within one kilometre of the coast, and five of its islands already lost to rising sea levels. As offshore fishery was the largest income-generating and job-creating sector in the country, diminishing maritime zones resulting from sea-level rise would threaten not only the success of its sustainable development projects and conservation efforts, but also the livelihoods of its people.

77. His delegation agreed with the view of the Study Group on the topic that at the time of the drafting of the United Nations Convention on the Law of the Sea, sea-level rise had not been perceived as an issue necessary to be addressed by the law of the sea, and that customs developed outside the context of climate change did not shed any light on the obligations enshrined therein. More recent State practice should be more of relevance to the Study Group.

78. His delegation believed that maritime boundaries and archipelagic baselines were fixed; once they had been determined in accordance with the Convention and deposited with the Secretary-General, they were not subject to change, notwithstanding sea-level rise. The foundational principles of certainty, predictability and stability in international law demanded that result. Solomon Islands remained in an endless state of recovery from slow-onset events. Ongoing resettlement of internally displaced populations was now the new normal for the country. Unfortunately, those most burdened by sea-level rise were the least equipped to weather such challenges alone. Solomon Islands therefore encouraged all delegations to engage with those issues in order to find an international solution to the problem.

79. With regard to the protection of persons affected by sea-level rise, the foundational principles of international cooperation must apply, to help States cope with the adverse effects of sea-level rise on their populations. The duty to cooperate with respect to the effects of sea-level rise should be informed by specialized legal regimes connected to sea-level rise. The Study Group should look to all such regimes to fully inform the content and scope of that duty in the current context.

80. The principle of cooperation had been interpreted in the context of human rights, the environment and other areas of international law as an obligation of States to exchange information and provide financial and technical assistance to States that required additional support. It was also important for States to consider disaster risk reduction principles when adopting measures in the context of sea-level rise, such as measures to help populations remain in situ or to evacuate and relocate populations. In that connection, his delegation encouraged the Study Group to consider the numerous international frameworks that incorporated those principles in its work.

81. His delegation supported the strong presumption in favour of continuing statehood, as the continued

existence of States was foundational to the current international framework. State practice supported the notion that States could continue to exist despite the absence of criteria under the Montevideo Convention on the Rights and Duties of States. The principles of stability, certainty, predictability and security also buttressed the presumption of continuing statehood. Sea-level rise could not serve as justification for denying vulnerable States vital representation in the international order.

82. **Mr. Taufan** (Indonesia), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that there should be no impunity for grave international crimes. His delegation appreciated the fact that the Commission had been working cautiously on the contentious topic to strike a balance between the fight against impunity and the need to foster inter-State relations through the principle of sovereign equality. However, given the sensitivity and complexity of the topic, the draft articles provisionally adopted so far by the Commission required more extensive study and analysis. The divergent views of members of the Commission on several important points, such as definitions, dispute settlement and the relationship with internationalized tribunals or the relationship with specialized treaty regimes, made them worth revisiting.

83. Turning to the topic of sea-level rise in relation to international law, he said that as the largest archipelagic State in the world, Indonesia believed that while the oceans held an overarching role in sustaining numerous facets of life, they could also pose considerable risks due to climatic change, including loss of territory and resources, which could lead to loss of sovereignty and jurisdictional rights. His delegation therefore saw the merit of further studying and deliberating on the topic, although it would encourage the Commission to proceed with caution, given the sensitivity of the topic, particularly in relation to borders and delimitations.

84. The Commission should ensure that the outcome of its work did not undermine the existing regime of the law of the sea under the United Nations Convention on the Law of the Sea and relevant international law; that the principles of certainty, security and predictability were respected; that the balance of rights and obligations was preserved; that the stability of boundary agreements was upheld, regardless of sea-level rise; that existing maritime boundary agreements were respected; and that the law of treaties prevailed. Accordingly, it should ensure that charts or lists of geographical coordinates of baselines that had been deposited with the Secretary-General were maintained.

85. **Mr. Skachkov** (Russian Federation), referring to the topic of immunity of State officials from foreign criminal jurisdiction and the draft articles provisionally adopted so far by the Commission, said that, although the Commission had succeeded, on the whole, in reflecting the procedural rules governing inter-State relations objectively, and had examined how the draft articles should be interpreted in detail, it needed to clarify a number of procedural aspects, including what acts constituted "exercise of criminal jurisdiction" and gave rise to the obligation to examine the question of immunity. In particular, in paragraph (6) of its commentary to draft article 8, the Commission should clarify the statement that a particular criminal procedure measure might affect the immunity of a foreign official only if it hampered or prevented the exercise of the functions of that person by imposing obligations upon him or her.

86. Although the Commission had agreed on the procedural aspects of immunity, the draft articles as a whole remained problematic, owing to the lack of consensus on draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), which was not supported by either State practice or *opinio juris*. The draft articles set out the actions to be taken by the competent State authorities when determining immunity and could offer practical guidance to States. However, they provided hardly any guarantees against the potential negative effects of draft article 7, including politically motivated prosecution. The differences of opinion within the Commission and the Committee regarding draft article 7 would need to be overcome before the Commission could adopt the draft articles on first reading.

87. The Special Rapporteur had raised a number of contentious issues in her eighth report (A/CN.4/739), including the relationship between immunity from foreign criminal jurisdiction and international criminal jurisdiction. His delegation continued to oppose the consideration of international criminal jurisdiction under the topic at hand, as it had been excluded from the scope of the draft articles from the outset. International criminal tribunals were subject to special legal regimes, such as the Rome Statute of the International Criminal Court or a resolution of the Security Council, which regulated the invocation of immunity. There was therefore no need to include a separate rule on that aspect in the draft articles.

88. The backdrop to the Commission's discussion of the issue was the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case, which was highly questionable in respect of customary international law. The establishment of the

International Criminal Court had had no effect on the rules of customary international law on immunity applicable to States that were not parties to the Rome Statute. A rule of customary international law on the absence of immunity from jurisdiction of international criminal tribunals could not exist in principle, as that would mean that a tribunal established by a subset of States could exert jurisdiction over officials of third States. His delegation therefore supported the Commission's intention to not examine the aforementioned judgment for the purposes of its work on the topic.

89. The formulation of draft article 17 (Settlement of disputes) proposed by the Special Rapporteur in her eighth report was significantly different from that of a typical dispute resolution clause. That was a matter best left to the discretion of States.

90. Noting the number of draft articles and the definitions to be included in draft article 2 that the Drafting Committee had yet to examine, and the complexity and contradictions of the topic as a whole, he urged the Commission not to rush to complete its first reading of the draft articles. It would be useful if the Commission could consider the inclusion in the draft articles of provisions relating to responsibility for violating the immunity of a foreign official. The draft articles also lacked a provision on acts *ultra vires* of State officials, although, in paragraph (5) of its commentary to draft article 2, as contained in its report on the work of its sixty-eighth session (A/71/10), the Commission had indicated that the question whether or not acts *ultra vires* could be considered as official acts for the purpose of immunity from foreign criminal jurisdiction would be addressed at a later stage, together with the limitations and exceptions to immunity.

91. Turning to the topic of sea-level rise in relation to international law, he noted that the Commission had included it in its programme of work at the request of States. Indeed, the views of States should be the main criterion used by the Commission when selecting topics for consideration. States should provide clearer guidance to the Commission to help it align its programme of work with their true needs.

92. The Commission should conduct an in-depth analysis and consider the relevant State practice for each of the issues related to the law of the sea raised in the first issues paper prepared by the Co-Chairs of the Study Group on the topic (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1), including baselines and the delimitation of maritime zones, the legal status of islands and artificial islands, land reclamation and fortification of islands dedicated to preservation from sea-level rise.

93. His delegation welcomed the intention of the Co-Chairs to be guided by the Commission's relevant prior work and to carefully study the doctrine. In the case of baselines, in particular, there was currently no applicable rule of customary law owing to a lack of recognized relevant *opinio juris* or State practice. A practical solution was needed that was aligned with the United Nations Convention on the Law of the Sea, on one hand, and reflected the concerns of States affected by sea-level rise, on the other. His delegation was generally in agreement with an approach that did not include changes to the objectives and principles enshrined in the Convention or to the balance between the interests of the interested parties it represented.

94. The Russian Federation agreed with the view that it was important to consider whether the principle of *rebus sic stantibus*, as provided for in the Vienna Convention on the Law of Treaties, was applicable to maritime boundaries. A preliminary analysis of treaty practice had revealed a significant number of treaties that contained no provision allowing for the correction of marine boundaries and also did not explicitly provide for the immutability of such borders. In a number of agreements, no coordinates had been specified for the border. His delegation supported the Co-Chairs' intention to conduct an in-depth study of treaty practice in all regions with regard to that issue.

95. As to the possible legal effects of sea-level rise on the exercise of sovereign rights and jurisdiction of coastal States and their nationals, as well as on the rights of third States and their nationals, in maritime spaces in which boundaries or baselines had been established, highlighted in section IV of the first issues paper, his delegation questioned whether it was appropriate to refer to the exercise of sovereign rights and jurisdiction by nationals, whether natural or legal persons, as their rights were derived from the rights and responsibilities of States. That point should be kept in mind when considering the subtopics concerning issues related to statehood and the protection of persons affected by sea-level rise.

96. **Mr. Bouchedoub** (Algeria), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that when preparing its relevant draft articles, the Commission should take into consideration the sovereign right of States to exercise their national criminal jurisdiction and endeavour to strike a balance between the laws of the forum State and those of the State of the official. It should also take into consideration the laws of the major legal systems in the

world and examine the practices of States and relevant precedents that could be useful in resolving issues that might arise in the application of immunity. The Commission should also adopt a comprehensive and integrated approach covering all aspects and cases that might arise, including by devising appropriate legal means for offering procedural guarantees that would prevent the misuse by any State of the right to exercise foreign jurisdiction for unilateral political purposes, particularly as a pretext to interfere in the internal affairs of other States.

97. Regarding the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), Algeria welcomed draft article 17 (Settlement of disputes), which established a system for the settlement of disputes divided into three consecutive phases: consultations, negotiations (both understood as mandatory mechanisms), and recourse to arbitration or the International Court of Justice (as alternative mechanisms of a voluntary nature). That model, which would be subject to the general rules on dispute settlement in force in contemporary international law, would give States a useful instrument for the defence of their respective rights and interests, avoiding situations of *fait accompli*.

98. His delegation had reservations about the current wording of draft article 18, which was inappropriate, from a legal point of view, because any question of immunity before international criminal tribunals was outside the scope of the current topic. Immunity before a particular international criminal tribunal was governed by the instrument establishing the legal regime of said tribunal. His delegation welcomed the consultation mechanism proposed in draft article 15 and the information exchange system provided for in draft article 12 [13], which were both intended to facilitate the early resolution of disputes. The inclusion of recommended good practices in the draft articles would not be useful, because the purpose of the draft articles was as to serve as guidance for States and not as legally binding rules.

99. Turning to the topic "Sea-level rise in relation to international law", he said that rising sea levels had become an issue of great importance for States, especially given the threat that it posed to coastal areas. Moreover, the international community had yet to address the legal implications of rising sea levels. His delegation welcomed the fact that the Study Group on the topic had examined the practice of African States regarding maritime delimitation and confirmed that the principles of international law supported fixed baselines or permanent maritime borders, as reflected in article 62, paragraph 2, of the Vienna Convention on the Law of Treaties.

100. His delegation encouraged the Study Group to continue examining the issue in more detail, bearing in mind the need to protect the rights of coastal States and the permanence of the sovereignty of States over their resources. Algeria called on the Commission to continue its efforts to develop international law without prejudice to the existing rights of States arising from the delimitation of maritime zones in accordance with the United Nations Convention on the Law of the Sea.

101. **Mr. Chrysostomou** (Cyprus), referring to the topic "Sea-level rise in relation to international law", said that rising sea levels posed a grave threat to the lives and livelihoods of populations across the globe and, in particular, those of low-lying coastal States and small island developing States, which faced the threat of partial or total de-territorialization and even of the loss of their permanent population. As an island-State itself, Cyprus had directly felt the grave consequences of climate change, including sea-level rise. While efforts to curb emissions and practical remedial measures should continue to be enforced as a priority, legal clarification as to the possible effects of rising sea levels might provide some assistance. His delegation welcomed the first issues paper of the Study Group on the topic (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) and looked forward to the future issues papers, which would deal with issues related to statehood and to the protection of persons affected by sea-level rise.

102. On the scope of the topic, it should be borne in mind that the Study Group had undertaken to simply outline key issues in three identified areas. It had no mandate whatsoever to propose modifications to existing international law, including the customary nature of the United Nations Convention on the Law of the Sea. His delegation could not overstate the importance for the Commission to ensure that the outcome of its work on the topic was in full compliance with the letter and spirit of the Convention. His delegation shared the concern expressed by both members of the Commission and States about the Commission tampering with the regime of islands, which was strictly outside the scope of its mandate. The Commission should be guided by its previous work and by input from States, and take into consideration the work already done on the topic by the International Law Association.

103. With regard to the substance of the topic, Cyprus believed that in order to effectively address the matter of coastal erosion, affected coastal States should be

entitled to designate permanent baselines pursuant to the United Nations Convention on the Law of the Sea, which would withstand any subsequent regression of the low-water line. That view was in conformity with the Convention and was aimed at safeguarding the legal entitlements of coastal States in light of the ongoing, worrisome developments generated by climate change.

104. Moreover, it was the position of his delegation that baselines must be permanent and not ambulatory, in order to ensure greater predictability with regard to maritime boundaries. That position was in line with the Convention and international jurisprudence, as reflected in the award of the Arbitral Tribunal of the Permanent Court of Arbitration in the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*. Fixing baselines at a certain point in time by way of maritime delimitation agreements and the decisions of the International Court of Justice, the International Tribunal for the Law of the Sea and arbitral tribunals established pursuant to the United Nations Convention on the Law of the Sea and other bodies was also consistent with the Vienna Convention on the Law of Treaties.

105. In that respect, the principle of fundamental change of circumstances (*rebus sic stantibus*) enshrined in article 62, paragraph 1, of the Vienna Convention would have no effect on existing maritime delimitation treaties. Article 62, paragraph 2 (a) of the Convention specifically provided that a fundamental change of circumstances might not be invoked as a ground for terminating or withdrawing from a treaty if "the treaty establishes a boundary." In the view of his delegation, that fundamental rule, intended to ensure the stability of international borders, applied to both land boundaries and maritime boundaries. Thus, rising sea levels should have no legal effect on the status of a concluded maritime treaty.

106. Cyprus agreed with the Co-Chair of the Study Group that limitation on the application of the principle of *rebus sic stantibus* seemed also applicable to maritime boundaries in the light of existing case law, which had recognized that there was no need to distinguish between land and maritime boundaries. That view reflected the pertinent international jurisprudence. It was also worth noting that the obligation under article 16 of the United Nations Convention on the Law of the Sea for coastal States to show the baselines for measuring the breadth of the territorial sea or the lines of delimitation derived therefrom on charts or on a list of geographical coordinates of points was meant to establish legal certainty. There was no stipulation that those charts were to be periodically revised.

107. A detailed version of his delegation's statement was available on the *e-Statements* portal.

108. **Mr. Santos Maraver** (Spain), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that the provisional adoption of six new draft articles on the procedural aspects of immunity by the Commission was welcome news, considering the practical relevance of the topic for States and the international community as a whole. Given its view on the importance of incorporating a procedural dimension into the Commission's work, his delegation shared fully the Special Rapporteur's assessment that the procedural provisions and guarantees were relevant for building trust between the States concerned, and for guiding the examination of the question of immunity in each specific case. They were also instrumental in establishing a necessary balance between the interests of the States concerned and would make it possible to address the legitimate concerns of various States with regard to the risks of politicization that might arise in the event that immunity of State officials from foreign criminal jurisdiction was not applied by the internal organs and courts of the State.

109. With regard to the draft articles provisionally adopted so far by the Commission, his delegation welcomed the adoption of draft articles 8 (Examination of immunity by the forum State), 9 (Notification of the State of the official) and 12 [13] (Requests for information). The affirmation that the authorities of the forum State must examine the question of immunity as soon as possible and before exercising their jurisdiction or taking coercive measures against the official of another State undoubtedly represented not only an essential element that must guide the actions of said authorities, but also a guarantee for the State of the official. The same applied to the definition of a duty to notify the State of the official when the authorities of the forum State intended to exercise their criminal jurisdiction or to take coercive measures against the official. That duty reinforced the guarantees for the State of the official and ensured that measures could not be taken that could make it impossible to subsequently apply the immunity of State officials from criminal jurisdiction.

110. The definition of a necessarily basic system referring to mutual requests for information between the two States concerned adequately rounded out the first block of procedural provisions. The proposals contained in draft articles 8, 9 and 12 represented a clear innovation with regard to immunity and should therefore be understood as proposals for progressive development. That did not, however, deprive them of value. On the contrary, they represented a good example

of the Commission fulfilling its mandate in a comprehensive manner.

111. His delegation considered that draft articles 10 (Invocation of immunity) and 11 (Waiver of immunity) sufficiently reflected international practice. It also supported the stipulation in paragraph 5 of draft article 11 that waiver of immunity was irrevocable. That provision was consistent with his country's laws, in particular Organic Act No. 16/2015, concerning the privileges and immunities of foreign States, international organizations and international conferences and meetings held in Spain.

112. His delegation was fully aware that some important draft articles of a procedural nature submitted to the Commission for consideration were still pending, in particular draft articles 13, 14, 15 and 16. Those draft articles were relevant, especially with regard to the determination of immunity, which was essential for the establishment of the correct balance between the guarantee of immunity and the protection of other values of the international community, especially the fight against impunity for the most serious crimes of international law, with which Spain continued to be closely connected.

113. Referring to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), he said that draft article 17 (Settlement of disputes) brought added value to the work of the Commission on the topic. Nonetheless, the actual wording of the draft article would depend to a large extent on the final form that the Commission wished to give to the draft articles.

114. His delegation supported the inclusion of a reference to international criminal tribunals in the draft articles. If, as his delegation was convinced, the fight against impunity for the most serious crimes of international law was an inescapable element of modern international law, the role that international criminal tribunals played in that context must be recognized in the draft articles. As for the final form in which that could be produced, his delegation was flexible and could support the maintenance of a standalone draft article or its inclusion in draft article 1, dealing with the scope of the draft articles.

115. Turning to the topic "Sea-level rise in relation to international law", he said that Spain was concerned about the consequences of rising sea levels for the international community. It stood in solidarity with the States that were most directly affected by the phenomenon, in particular small island developing States. It was imperative for the Commission to continue working on the topic in a manner that ensured the respect for and integrity of the United Nations Convention on the Law of the Sea, and also allowed for the identification of special formulas that reflected the extraordinary circumstances that various States, especially small island developing States, endured as a consequence of sea-level rise due to climate change. His delegation was confident that the Commission would be able to offer solutions that reflected both legal stability and justice.

116. Lastly, his delegation would like to see a correction in the gender imbalance in the membership of the Commission, which currently had only four female members, and only eight of the candidates for the upcoming elections were women. Spain was therefore once again submitting the candidacy of Concepción Escobar Hernández for election to the Commission. It hoped that States would support her election, allowing her to complete her work as Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction".

117. **Ms. Vea** (Tonga), referring to the topic "Sea-level rise in relation to international law", said that the first issues paper presented by the Study Group (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) had set a strong foundation for continuing dialogue about the effects of sea-level rise on international law. The Intergovernmental Panel on Climate Change had grimly reported that sea levels would continue to rise and that certain regions of the world, particularly small island developing States like Tonga, were more likely to experience the effects of sea-level rise sooner and more extensively than other States. As sea-level rise eroded coastlines and altered low-water lines, it threatened the current delineation of baselines and maritime zones of coastal States. That unprecedented reality had not been contemplated when the legal regime for ocean governance under the United Nations Convention on the Law of the Sea had been negotiated 40 years earlier. The current deliberations of the Commission were vital to filling that gap and strengthening the framework of the Convention to address the modern reality of sea-level rise.

118. The leaders of the Pacific Islands Forum had expressed their commitment to ensuring that the maritime zones of Pacific States were delineated in accordance with the Convention and that they would not be challenged or reduced due to climate change-induced sea-level rise. It was important to preserve the baselines and outer limits of maritime zones measured therefrom, as well as the entitlements of coastal States, despite climate change-induced sea-level rise. It was also important to interpret and apply the Convention in a way that respected the rights and sovereignty of vulnerable small island developing States.

119. Her delegation welcomed the Commission's commitment to reviewing State practice on that question and the preliminary conclusion of the Study Group on the topic that the maintenance of maritime zones once notifications had been deposited could be consistent with the Convention. It also recognized the implications of sea-level rise for statehood, statelessness, the exacerbation of disasters and climate change-induced migration. Due to its geographical, geological and socioeconomic characteristics, Tonga was already seeing above-average sea-level rise, along with coastal erosion and frequent natural disasters.

120. A decade earlier, it had become the first country in its region to develop a joint national action plan on climate change adaptation and disaster risk management. Nonetheless, the risks to its future were only increasing. Like other low-lying coastal States, Tonga faced the daunting reality that the ocean would completely submerge its territory in the decades to come and force its people to seek shelter elsewhere. Yet, a defined territory and population were key indicia of statehood under international law. For small island developing States, that was a question of survival. Tonga therefore stressed the need to quickly address the international law implications of those emerging issues. It also welcomed the Study Group's discussions on the nexus between sea-level rise and loss of statehood and the protection of persons affected by sea-level rise.

121. **Mr. Stellakatos Loverdos** (Greece), addressing the topic "Immunity of State officials from foreign criminal jurisdiction", said that the efforts of the Special Rapporteur had enabled the Commission to make considerable progress, with the provisional adoption of six new draft articles on the procedural aspects of immunity. His delegation hoped that the Commission would be able to overcome the differences of views on that sensitive issue and complete the first reading of the draft articles during the current quinquennium.

122. Referring to the draft articles provisionally adopted so far by the Commission, he said that it was important to bear in mind, as the Commission itself had indicated in its commentaries, that some of the draft articles should be reviewed before their adoption on first reading, to ensure that the use of certain key terms and their respective meanings were consistent and systematic throughout the draft articles. With regard to draft article 8, his delegation wondered whether the phrases "may be affected by the exercise of its criminal jurisdiction" and "may affect an official of another State" used in paragraphs 1 and 2 were too broad and general. The Commission should consider whether those phrases could be supplemented with further qualifications in order to clearly delimit their scope.

123. Regarding draft article 9, his delegation welcomed the alignment of the temporal standard for notifying the State of the official with the one stipulated in subparagraphs (a) and (b) of paragraph 2 of draft article 8. However, it shared the concerns expressed in the Drafting Committee that the phrase "that may affect an official of another State" was too broad and could have unintended effects on the exercise of criminal jurisdiction by the forum State. His delegation was not convinced that the purpose of paragraph 2 of draft article 9, which, to its understanding, was to provide for a minimum threshold of information to be included in the notification, was served by the adverb "inter alia".

124. Concerning paragraph 3 of the draft article, his delegation was pleased that the Commission had reformulated the means of communication that the forum State might use to transmit notifications to the State of the official to mention "diplomatic channels" first, and to include "applicable international cooperation and mutual legal assistance treaties" only as a subcategory of "other means of communication accepted for that purpose by the State concerned". Indeed, considering the specific content and modus operandi of those treaties, his delegation shared the concerns expressed within the Commission, as reflected in the relevant commentary, since it was still not clear to the delegation how such treaties could be used for the purposes of draft article 9. Further explanations - and if possible concrete examples - by the Commission in the commentary to the draft article would be particularly useful.

125. His delegation agreed with those members of the Commission who doubted the usefulness and desirability of paragraph 5 of draft article 11, concerning the irrevocability of waiver of immunity, since the relevant treaties concluded so far did not expressly refer to that issue and State practice was limited.

126. Referring to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), he said that his delegation continued to have doubts about the advisability of examining the effect that the duty to cooperate with an international criminal tribunal might have on the immunity of State officials from foreign criminal jurisdiction, not only because such an exercise would exceed the scope of the current draft articles, as set out in draft article 1, but also in view of the diversity of existing international criminal tribunals and the fact that the relevant duty of States and the procedural treatment of those cases were mainly governed by the instruments establishing those tribunals.

127. Considering the concerns expressed by some members of the Commission about the inclusion of a "without prejudice" clause, as proposed in draft article 18, his delegation hoped that the Commission would be able to propose wording on the relationship between the current draft articles and the rules governing international criminal tribunals – preferably as a new paragraph 3 of draft article 1 – that would highlight the autonomy of the respective legal regimes without implying a hierarchical relationship among them.

128. Regarding draft article 17 (Settlement of disputes), it was the understanding of his delegation that the intention of the Special Rapporteur was to propose an additional procedural safeguard to complement the procedural guarantees contained in Part Four, which would enable States to resolve a controversy arising in the process of determination of immunity at an early stage, avoiding thus a *fait accompli*, and not a mechanism of last resort for identifying and restoring *ex post facto* international legality. If so, then the current draft article should be formulated as a general recommendation to help States resolve any differences that arose in practice in the determination and application of immunity at an early stage, using, at their discretion, the means for dispute settlement set forth in Article 33 of the Charter of the United Nations.

129. Turning to the topic of sea-level rise in relation to international law, he said that the United Nations Convention on the Law of the Sea possessed a universal and unified character, and set out the legal framework within which all activities in the oceans and seas must be carried out. It therefore established the legal basis for settling and regulating any relevant issue which might arise. It also provided answers to the questions raised with respect to the topic, within their proper context. The Convention promoted stability of law as well as the maintenance of international peace and security, and was aimed at preserving legal certainty in all matters, including those of maritime entitlements and maritime boundaries. Thus, predictability, stability and certainty, which were inherent to the Convention and guided its application, required the preservation of baselines and of the outer limits of maritime zones measured therefrom, as well as of the maritime entitlements of coastal States. Consequently, generalized interpretations that could lead to unpredictable and uncertain outcomes should be avoided.

130. The Convention imposed no obligation to review or recalculate baselines, or the outer limits of maritime zones established in accordance with its provisions. It was therefore important to safeguard the stability of maritime boundaries confirmed by State practice and international jurisprudence, including by the International Court of Justice in its judgment in the case of *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, when it said: "The Court observes that boundaries between States, including maritime boundaries, are aimed at providing permanency and stability". For that reason, maritime boundary agreements were subject to the rule excluding boundary agreements from fundamental change of circumstances; as a consequence, sea-level rise did not affect maritime boundaries.

131. Such sensitive questions should be addressed with caution within the Commission, as they touched upon a carefully balanced legal regime for activities at sea whose integrity should always be maintained. It was important to avoid the risk of considering questions, such as the study of various sources and principles and rules of international law, which had little or no relevance to the topic and also distracted from the task of addressing and placing the question within its only natural framework, namely the United Nations Convention on the Law of the Sea. His delegation had previously expressed reservations about the current topic mainly out of concern that the Commission might ignore the complexity of the established rules and delicate balances already achieved in the Convention in its current study. Greece would appreciate further concrete proposals from the Commission as to the anticipated format of future discussions on the issue.

132. **Mr. Hitti** (Lebanon) said that his delegation commended the Commission for its flexibility, adaptability and resourcefulness in overcoming the constraints caused by the coronavirus disease pandemic (COVID-19) by working in a virtual setting and making greater use of electronic means for the distribution of materials. However, as highlighted in the Commission's report (A/76/10), that format had raised a number of challenges, including working across different time zones, Internet connectivity and reduced hours of interpretation. His delegation called for an enhancement in the relationship between the Commission and the Committee, and endorsed some of the interesting ideas that had been advanced to that end, including limiting the number of topics on the Commission's programme of work, providing executive summaries of the report on the Commission's work, and holding informal virtual briefings to be presented by the Special Rapporteurs of each topic ahead of the publication of the report.

133. Addressing the topic of sea-level rise in relation to international law, he said that as rising sea levels posed multifaceted challenges to all nations, in particular to small island developing States, it was important for the Commission to clarify the international legal framework

governing the topic. It should take into consideration the centrality of the United Nations Convention on the Law of the Sea and strive to preserve its integrity and the stability provided by its rules, while drawing on the practice of States when needed.

134. His delegation looked forward to the second issues paper to be prepared by the Study Group on the topic, addressing issues related to statehood and to the protection of persons affected by sea-level rise. It was important for the Commission to bear in mind that, as indicated in the syllabus prepared in 2018, the issues of the law of the sea, statehood and protection of persons affected by sea-level rise were interconnected and should be examined collectively.

135. Lastly, Lebanon, along with the Kingdom for Bahrain, had nominated Nassib G. Ziadé for election to the Commission for its upcoming term and hoped that other States would support his candidacy.

The meeting rose at 1.05 p.m.