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Chair: Mr. Leal Matta (Vice-Chair) (Guatemala)

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In the absence of Mr. Afonso (Mozambique), Mr. Leal Matta (Guatemala), Vice-Chair, took the Chair.

The meeting was called to order at 3 p.m.

Agenda item 77: Report of the International Law Commission on the work of its seventy-third session (continued) (A/77/10)

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-third session (A/77/10).

2. **Ms. Silek** (Hungary), addressing the topic “Sea-level rise in relation to international law”, said that protecting the environment and adapting to climate change were priorities for her Government. While action to prevent and slow the process of sea-level rise was essential, there was also an emerging need to focus on climate change adaptation. Developing resilience-focused policies and supporting legal frameworks with a view to preventing and mitigating human crises such as forced migration, human displacement and other economic and non-economic losses and damage should be a primary goal of common action. In that context, her delegation welcomed the second issues paper on sea-level rise in relation to international law (A/CN.4/752 and A/CN.4/752/Add.1) prepared by the Co-Chairs of the Study Group on the topic, considering that it provided a good overview of current practices and raised some important questions.

3. In respect of the issue of statehood, a key conclusion of the second issues paper was that it was difficult to rely on State practice owing to the scarcity of cases relating to continuity of statehood following loss of territory. While her delegation recognized that loss of territory was a valid long-term concern, it believed that the Commission’s primary focus in addressing the topic should be the human rights-related issues that were already pressing. In the second issues paper the Co-Chairs had mentioned that the current international legal framework was potentially applicable to the protection of persons affected by sea-level rise but had not given detailed consideration to how general and sector-specific human rights conventions and agreements might be applied to problems arising as a consequence of sea-level rise. Thus, given that progressive development of international law was one of its main objectives, and in view of the fragmented nature of the current international legal framework, the Commission should set short-, medium- and long-term priorities for its work on the topic.

4. An analysis of what affected States might do to address challenges affecting their citizens’ enjoyment of human rights, and whether they had obligations in the event that sea-level rise adversely affected those rights, was one possible short-term objective. As a medium-term goal, a discussion of migration-related issues seemed unavoidable, given that climate-related migration was one of the main challenges that the world now faced and, as a consequence of sea-level rise, States would have to deal with not only unfavourable changes to living conditions but also losses or partial losses of territory. In that context, such questions as the duties of third States in relation to the consequences of sea-level rise, the applicability of temporary and subsidiary protection measures and the principle of *non-refoulement* required careful analysis. In fact, continuing discussion was needed on all aspects of sea-level rise. With the most severe effects expected to emerge only in the longer term, the next quinquennium offered a unique opportunity for the international community to plan and prepare legal and practical solutions. The key to identifying sustainable solutions lay in maintaining the universal nature of existing legal instruments, such as the United Nations Convention on the Law of the Sea, and enhancing bilateral, regional and multilateral cooperation, for example by sharing best practices and, where necessary, concluding international agreements.

5. **Mr. Bigge** (United States of America), referring to the topic “Immunity of State officials from foreign criminal jurisdiction”, said that his delegation had long-standing concerns about the Commission’s draft articles on immunity of State officials from foreign criminal jurisdiction that remained unaddressed. In particular, it did not agree that draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) was supported by sufficient State practice and *opinio juris*; consequently, it did not reflect customary international law. The Commission should work by consensus to weigh the serious issues involved and account for State practice; however, despite the concerns raised by his delegation and others over the years, the Commission had adopted the draft articles on first reading. The Commission should reflect further on the concerns raised previously before the Sixth Committee and those that his delegation would subsequently raise in writing. If the draft articles were not revised, the Commission should indicate clearly in the relevant commentaries which draft articles reflected a proposal for the progressive development of international law rather than its codification. Furthermore, if various draft articles that did not reflect customary international law and diverged from the expressed views of States were not reworked, the

possibility of the draft articles ending up being adopted by States as an international convention would be greatly reduced. His delegation therefore urged the Commission to reconsider both the substance and form of the draft articles in that light.

6. Regarding the topic “Sea-level rise in relation to international law”, he wished to draw attention to his Government’s new policy on sea-level rise and maritime zones. In application of the new policy, which recognized changing trends in State practice and evolving views regarding the need for stable maritime zones in the face of sea-level rise, his Government would work with other States towards the goal of lawfully establishing and maintaining baselines and maritime zone limits and would not challenge baselines and limits that were not updated despite the sea-level rise caused by climate change.

7. His delegation appreciated the Commission’s work on issues of statehood, as described in the second issues paper on sea-level rise in relation to international law ([A/CN.4/752](#) and [A/CN.4/752/Add.1](#)) prepared by the Co-Chairs of the Study Group on the topic. Such matters were of vital concern for the States most at risk from sea-level rise, and the issues identified by the Study Group thus far raised complex legal questions related to foundational aspects of international law. Given the lack of relevant State practice, it was difficult to draw definitive conclusions as to how international law in that area would develop. However, the United States looked forward to working with other countries to address legal issues of statehood as they arose.

8. The United States also welcomed the consideration given to the issue of protection of persons affected by sea-level rise. His Government had been focusing on the related area of climate-related migration, the White House having released its report on the impact of climate change on migration in October 2021. In order to better address issues of protection in the context of climate change, his Government was looking at ways to strengthen the application of existing protection frameworks, adjust its protection mechanisms in order to better accommodate people fleeing the impacts of climate change, and evaluate the need for additional domestic legal protections for those who had no alternative but to migrate.

9. **Ms. Orosan** (Romania), speaking on the topic “Immunity of State officials from foreign criminal jurisdiction”, said that her delegation was pleased that the adoption, on first reading, of the Commission’s draft articles on immunity of State officials from foreign criminal jurisdiction had been consensual. The Commission’s approach to the topic achieved a good

balance between respect for the immunity of State officials and the protection of other values shared by the international community, such as accountability for the most serious crimes under international law. The fact that the draft articles addressed the relationship between the immunity of State officials from foreign criminal jurisdiction and the obligation to cooperate with international criminal tribunals was particularly valuable. Her Government was a firm supporter of accountability for the most serious crimes committed against civilians and the essential role of the international criminal tribunals in that regard.

10. In draft article 1 (Scope of the present draft articles), the wording of paragraph 3 could be seen as providing a safeguard intended to preserve both the regime for immunity of State officials from foreign criminal jurisdiction set out in the draft articles and the regime applicable to international criminal courts and tribunals. However, as the paragraph was currently formulated, the last phrase “as between the parties to those agreements” might be considered redundant. The procedural provisions contained in Part Four of the draft articles in principle offered the guarantees necessary to protect the interests of both the forum State and the State of the official. However, in draft article 11 (Invocation of immunity), the consequences of failing to invoke immunity within a reasonable time should be conveyed more clearly. Since States were expected to exercise the right to invoke immunity in good faith at the earliest stage in the proceedings, and to refrain from abusing the discretion accorded them, there was merit in prescribing that immunity should be invoked “as soon as possible”. However, a State that did not exercise the right as soon as it became aware that the criminal jurisdiction of another State could be or was being exercised over the official should not be barred from invoking immunity at a later stage in the proceedings. Given the obligation of the forum State to address the issue of immunity *in limine litis*, and also to seek the cooperation of the State of the official for the purpose of determining whether immunity applied, as established in draft article 13 (Requests for information), immunity could also be invoked during the consultation procedure.

11. On the margins of the 63rd meeting of the Committee of Legal Advisers on Public International Law of the Council of Europe, held in Bucharest in September 2022, her Government had organized a regional seminar on States’ obligations under public international law in relation to the immunity of State officials. The event had facilitated an academic and expert exchange of views on that complex topic, with a focus on the relationship between the relevant

jurisprudence of international courts and the customary immunities of State officials.

12. Regarding the topic “Sea-level rise in relation to international law”, her delegation reaffirmed its consistent position that the United Nations Convention on the Law of the Sea should be the cornerstone of relations between States, that the unified and universal character of the legal framework provided by the Convention should be the fundamental basis for addressing all maritime legal issues, and that preserving the baselines and outer limits of maritime zones was crucial to legal stability. In that context, it was not seeking legal innovations or amendments. It recognized the many difficult questions that the Commission’s analysis of the topic of sea-level rise raised in connection with issues of statehood and the protection of human rights and reserved the right to comment on those issues at a later stage, in anticipation of further research to be undertaken by the Commission’s Study Group on the topic.

13. For the time being, her delegation would limit itself to noting that, in the virtual absence of relevant precedents, the topic called for innovation and adaptive solutions. That said, where there was no need to depart from existing law, it saw no reason to be original. Accordingly, it was supportive of the prudent approach that the Co-Chairs of the Study Group seemed to favour, which involved mapping the existing law in the light of the particularities of sea-level rise identified in the second issues paper with a view to determining where the current normative framework was insufficient and new legislation was needed. From that perspective, the Commission’s work on issues of statehood should be focused on the possible ways in which a State might continue to function in the event that its territory was affected by sea-level rise to the extent that it was no longer habitable, rather than on the question of whether or not, in such circumstances, the State would continue to exist. On the human rights side, increasing litigation on the issue of climate change and its negative impact on human rights could be a potentially major source of inspiration for further analysis of the topic by the Commission.

14. **Ms. Noor Azman** (Malaysia), referring to the topic “Immunity of State officials from foreign criminal jurisdiction”, said that the issues discussed in the Special Rapporteur’s eighth report (A/CN.4/739) were of great importance and warranted detailed consideration. Her delegation encouraged all Member States to submit comments on the draft articles on immunity of State officials from foreign criminal jurisdiction, as adopted on first reading, before the December 2023 deadline in order to ensure that the

Commission received a holistic and all-encompassing range of views. With regard to the substance of the draft articles, her delegation was of the view that the provisions of draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) and the related annex, as currently formulated, might raise difficulties for States that were not parties to the Rome Statute of the International Criminal Court, the International Convention on the Suppression and Punishment of the Crime of Apartheid and the International Convention for the Protection of All Persons from Enforced Disappearance. Consideration should be given to the possibility of including a provision that allowed States to formulate a reservation to that draft article and the annex.

15. With regard to the topic “Sea-level rise in relation to international law”, her delegation noted that, while as yet there had been no cases in which a State’s land territory had been completely covered by the sea or had become uninhabitable due to sea-level rise, a number of States, particularly small island States, were already facing the impact of rising sea levels. It agreed with the Commission that all States, regardless of whether they were currently facing the impact of sea-level rise, should begin deliberations with a view to finding a solution to the issue. On the issue of statehood, great caution was needed in respect of any presumption of continuity of statehood for States directly affected by sea-level rise, since such a presumption would ultimately lead to the exclusion of the criteria for statehood set forth in the 1933 Convention on Rights and Duties of States. Recalling the mandate of the Study Group, her delegation urged States to proceed with caution so as not to modify existing international law, in particular the United Nations Convention on the Law of the Sea. Although some island States affected by sea-level rise had already constructed artificial islands with a view to preserving their statehood, the effects of sea-level rise under international law remained ambiguous and needed to be examined carefully. There was clearly a nexus between the preservation of statehood and the exercise of sovereignty and jurisdiction over land territory and maritime spaces, such as the territorial sea, the exclusive economic zone and the continental shelf. Since sovereignty was exercised on a territorial basis, continuity of statehood should be very closely dependent on land territory and the maritime spaces generated by that territory. Hence, the exercise of a State’s sovereignty could not be based on an artificial territory.

16. With regard to principles that might provide guidance for the protection of persons affected by sea-level rise, her delegation agreed with the Co-Chairs of

the Study Group that there was currently no binding international legal instrument that dealt specifically with that issue. While Malaysia acknowledged that the impact of sea-level rise on affected persons required consideration, it was of the view that any future obligations to provide protection and assistance to such persons should be based on the principle of common but differentiated responsibilities, the national capacity of non-affected States, humanitarian principles and case-by-case analysis. Her Government stood ready to provide assistance and protection to affected persons in accordance with its sovereign responsibility under international law – a responsibility that included protecting national security, public order (*ordre public*), morals and the rights and freedom of Malaysian citizens.

17. **Mr Tichy** (Austria), addressing the topic “Immunity of State officials from foreign criminal jurisdiction”, said that the text of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading represented important progress towards a well-balanced outcome. Regarding draft article 2 (Definitions), his delegation wished to suggest adding a definition of the term “State of the official”, which was used frequently throughout the draft articles; in particular, it would be helpful to clarify that the “State of the official” did not necessarily correspond to the State of the official’s nationality. His delegation questioned the wording “exercise of State authority” used in the definition of an “act performed in an official capacity” in draft article 2 (b), as it did not correspond to that used by the Commission in its articles on responsibility of States for internationally wrongful acts, in which reference was made to the exercise of “elements of governmental authority”. It would be preferable to revert to the terminology used in those articles.

18. The reference to State officials “acting as such” contained in draft article 5 (Persons enjoying immunity *ratione materiae*) was too broad, as the scope of the draft article might thus be understood to encompass acts performed by a State official that would be qualified as unlawful in the forum State or that fell outside the competence of the official in the forum State. The scope of the draft article should therefore be narrowed, an aim that could be achieved by adding the phrase “to the extent that the action undertaken in the forum State is in conformity with international law” at its end. Like others, his delegation understood draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) as a compromise intended to aid the fight against impunity and saw a close link between the draft article and the procedural provisions and safeguards contained in Part Four of the

draft articles. While it understood the reasons for that compromise, it believed that the crime of aggression should have been included in the list of crimes in respect of which immunity *ratione materiae* should not apply.

19. In paragraph 1 of draft article 10 (Notification to the State of the official), the wording used in the phrase “coercive measures that may affect an official of another State” seemed too broad. Notification should be required only if the measures in question might affect the immunity of an official. On the other hand, when an official claimed immunity, notification should be obligatory. In paragraph 1 of draft article 11 (Invocation of immunity), the phrase “in the interests of all parties concerned” should be added at the end of the second sentence, and, in draft article 12 (Waiver of immunity), a clause reminding forum States of their right to request a waiver of immunity should be included. The simplest way to achieve that end would be to reformulate paragraph 1 of the draft article so that it read: “The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official either *proprio motu* or upon request by the forum State”.

20. The procedural provisions and safeguards contained in Part Four of the draft articles should establish the right of representatives of the State of the official to be present during the relevant judicial proceedings of the forum State. For that purpose, in both draft article 14 (Determination of immunity) and draft article 16 (Fair treatment of the State official), which addressed different stages of proceedings, the following additional text could be introduced: “In any of these proceedings, a representative of the State of the official shall be entitled to be present to support the State official concerned”. In draft article 15 (Transfer of the criminal proceedings), the transfer procedure described should be understood as being without prejudice to applicable treaties on judicial cooperation or extradition. Draft article 18 (Settlement of disputes) was a welcome addition to the text. However, when the draft articles were transformed into a convention, which his delegation hoped would soon be the case, time limits would need to be established for any dispute settlement in relation to pending criminal proceedings. Situations in which national proceedings needed to be suspended during an ongoing international dispute settlement would also need to be addressed, and the criteria for such suspensions established.

21. Turning to the topic “Sea-level rise in relation to international law”, he said that the issues addressed by the Commission’s Study Group on sea-level rise in relation to international law would increase awareness of the legal implications and other problems associated with rising sea levels, which were of existential

importance to a number of States but also affected the international community as a whole. In the second issues paper (A/CN.4/752 and A/CN.4/752/Add.1), which – like the first issues paper (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1) prepared in 2020 – had led to a rather controversial discussion in the Commission’s session, the Co-Chairs of the Study Group had rightly highlighted the difficulties associated with a presumption of continuity of statehood in the event that the territory of a State was completely covered by sea or was rendered uninhabitable by sea-level rise. They had also shown that attempts to draw parallels with special entities considered to enjoy international legal personality, such as the Holy See and the Sovereign Order of Malta, might be of limited use for States with a regular population and that Governments in exile provided a useful source of comparison only to a limited extent. It seemed, therefore, that the different modalities of continuity of statehood outlined in the second issues paper, which included the ceding or assignment of segments or portions of territory to other States, association with other States, and the establishment of confederations or federations, might prove a more promising guide in the search for possible legal options for coping with the phenomenon of sea-level rise.

22. On the issue of the protection of persons affected by sea-level rise, many fundamental questions concerning the applicability of human rights obligations remained to be addressed. With regard to the Study Group’s further work on the subtopics of statehood and protection of persons affected by sea-level rise, his delegation believed that it would be quite a challenge for the Commission to examine the broad array of issues listed in paragraphs 235 and 236 of its report (A/77/10) alongside the other topics on its programme of work. His delegation was nonetheless pleased that the Commission was addressing the important topic of sea-level rise and was certain that its work on the subject would make a significant contribution to the clarification of international law in respect of the phenomenon.

23. **Ms. Jiménez Alegría** (Mexico), referring to the topic “Immunity of State officials from foreign criminal jurisdiction”, said that, at its seventy-third session, the Commission had made significant further progress towards a final document. The topic was of fundamental importance for diplomacy and inter-State relations and the draft articles on immunity of State officials from foreign criminal jurisdiction, together with the commentaries thereto, represented a very significant effort to systematize and clarify the rules of international law applicable to State officials. The rules on jurisdiction and immunity to which those officials

were subject emanated from principles and practices that had long been applied in inter-State relations. The draft articles thus reflected some already existing rules of customary international law and provided an opportunity to clarify their application. They provided not only general guidance concerning immunity *ratione personae*, immunity *ratione materiae* and exceptions thereto but also procedural provisions for invoking or waiving immunity, ensuring fair treatment and transferring criminal proceedings.

24. Her delegation welcomed the inclusion of a clause on the peaceful settlement of disputes in draft article 18. A procedure that involved consultation, negotiation and judicial or arbitral settlement could be extremely useful for States seeking peaceful solutions to problems arising in connection with perceived violations of the immunity of State officials. More generally, the Commission’s work on the topic and the comments submitted by States would make it possible to establish clearer rules regarding the privileges and immunities of State officials and thus allow for more efficient diplomatic relations. Since the mandate of the Special Rapporteur had reached an end, her delegation called for a new Special Rapporteur to be appointed in order to ensure continuity in the consideration of that very important topic.

25. With regard to the topic “Sea-level rise in relation to international law”, her delegation welcomed the decision to study the international law implications of rising sea levels, a phenomenon that was closely linked to global warming and thus one of the most pressing issues facing humanity. Continued action by States to respond to and contain climate change within a framework of international cooperation was essential. The implications of sea-level rise for the rights and obligations of States and relations between them must also be discussed. The status of islands, rocks and low-tide elevations and the displacement of baselines and maritime zones were all issues with potential consequences for the sovereign and economic rights of States in respect of various areas. The topic of sea-level rise in relation to international law was a technical area of study to which the contributions and perspectives of established experts in the field such as those forming part of the Commission’s Study Group on sea-level rise in relation to international law were of great importance.

26. The consequences of sea-level rise should be considered not only from the perspective of States as abstract entities. The protection of persons affected by the phenomenon, particularly those in the most vulnerable groups, should be at the centre of discussions. The Study Group’s recent work was important precisely because it addressed the issue of

protection of persons affected by sea-level rise, and, although that work was still in the early stages, its further development would provide important guidance for State action. It was essential for the Study Group to address the practice of coastal States, which were the ones most affected by sea-level rise. For that reason, her delegation welcomed the Commission's decision to broaden its study of practice and *opinio juris* in various regions of the world, including Latin America, to consider the application of general principles and pre-existing norms of international law and to consult with scientific and technical experts in the field.

27. **Mr. Kanu** (Sierra Leone), referring to the topic "Sea-level rise in relation to international law", said that his delegation wished to underscore, with regard to both the material and temporal scope of the Commission's work on the subject, that the Study Group on sea-level rise in relation to international law should not be prevented from reaching conclusions on whether existing international law would be sufficient to address the challenges faced or whether new rules or principles were required to fill potential gaps. His delegation also agreed that, as members of the Study Group had suggested, "in the particular circumstances of an extremely complex, existential and unavoidable phenomenon such as sea-level rise, where there was limited State practice since no State had yet been fully submerged, the Commission might [...] have recourse to reasoning by analogy and interpretative norms, consistent with its mandate to progressively develop international law".

28. With regard to sources of law, his delegation saw the relevance of the principle of international cooperation, among others, for the subtopics of statehood and the protection of persons affected by sea-level rise. As suggested in the second issues paper by the Co-Chairs of the Study Group on the topic (A/CN.4/752), that principle could play an important role for States to provide for their own preservation. Furthermore, the very high cost of preservation measures such as the installation or reinforcement of coastal barriers or defences and dykes, underlined the importance of international cooperation through technology transfer and the exchange of best practices. The principle of common but differentiated responsibilities was also relevant, in that the cost of addressing such a severe global environmental problem should be distributed among States according to their historical responsibility and their capabilities. The Co-Chairs of the Study Group had also, importantly, identified principles relating to the rights and duties of States, including the unalienable right to take measures to remain a State, a list of relevant aspects for

consideration with respect to statehood, and the need to further develop the existing fragmented international legal frameworks potentially applicable to the protection of persons affected by sea-level rise. Overall, the Commission was to be commended for the steady progress being made on the topic. His delegation shared the views expressed in the second issues paper regarding the nature of the global phenomenon of sea-level rise and the serious threat it represented, as well as the sense of urgency expressed by several members of the Study Group in the face of the issues at stake and the gravity of the situation. It appreciated the efforts made to take account of regional perspectives, including the views of African States, on the subtopics of statehood and protection of persons affected by sea-level rise. Those efforts, together with the attention accorded to critical questions related to the law of the sea, were crucial to ensuring that whatever outputs were ultimately generated gained broad acceptance among Member States. His delegation supported the Commission's plans to consolidate the work of the Study Group at a later stage with a view to drawing conclusions on a way forward.

29. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said that it was of great interest to Member States, including African States, as its study encompassed issues of State sovereignty and diplomatic relations as well as touching upon other topics being addressed in the Sixth Committee and by the Commission. With regard to the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, his delegation noted with interest the inclusion in draft article 1 (Scope of the present draft articles) of a new paragraph 3, containing a "without prejudice" clause intended to ensure the separation and independence of the draft articles and the special legal regimes applicable to international criminal courts and tribunals. That was of particular interest to Sierra Leone, as a party to the Rome Statute of the International Criminal Court, as it meant that draft articles 3 to 7, and, more importantly, the procedural provisions and safeguards contained in Part Four of the draft articles, would not apply between States parties to the Rome Statute. In the case of the International Criminal Court, the provision should be read within the framework of the principle of complementarity, where the Court was the court of last resort.

30. His delegation agreed with the provisions of draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply). Irrespective of whether the draft article codified existing law or was intended to contribute to progressive

development, the clarity that the draft article provided in respect of some of the worst crimes under international law was welcome and should help victims to obtain justice. Critically, moreover, judicial interpretations issued by the International Criminal Court in respect of the obligations of States parties to the Rome Statute, including their obligations under article 27, regarding irrelevance of official capacity, and part 9, regarding international cooperation and judicial assistance, were not in any way affected by the Commission's interpretations, including its interpretations of the case law of the Court.

31. Regarding draft article 14 (Determination of immunity), his delegation, considering the diversity of State practice, generally agreed that a determination of immunity should be made early in the proceedings. The wording used in the phrase "competent authorities of the forum State" was appropriate since a determination could be made by a police officer, prosecutor or foreign ministry official, before the courts became involved. Such a determination would not, however, preclude the courts of the forum State from also expressing an opinion subsequently. The Commission's decision to differentiate between examination of immunity, which was addressed in draft article 8, and determination of immunity, which was addressed in draft article 14, was noted. However, his delegation would continue to examine the utility of retaining both draft articles.

32. His delegation agreed with the inclusion, in draft article 14, paragraph 1, of the phrase "and in conformity with the applicable rules of international law", since it emphasized that, regardless of the flexibility envisaged with respect to the organs, laws and procedures of the forum State, the result of the process of determination must be consistent with international law. With regard to paragraph 2 of the draft article, his delegation agreed with the decision to use a non-exhaustive list of the factors that the competent authorities should take into account when making a determination about immunity. With regard to paragraph 3, his delegation took note of the robust debate that had taken place in the Commission, including with regard to the need to refer to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) and to provide procedural safeguards for the application of exceptions that were seen as very broad in scope. While it would continue to study the matter, his delegation was of the view that the decision to include procedural safeguards specifically applying to draft article 7 might lend clarity and address the risk of politicization, given the possible scope of the jurisdiction of competent authorities, regardless of whether they were "at an appropriately high level". The

use of a standard of proof inspired by the standards defined in the Rome Statute of the International Criminal Court, namely that "the competent authorities must assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7" further consolidated what was already the practice of the States parties to the Rome Statute. Such a high standard of proof might trigger an interpretation similar to that employed in respect of the Rome Statute, even if that was not the stated objective. Lastly with regard to draft article 14, his delegation wished to express its support for the decision not to include a provision requiring the official to be present in the territory of the forum State when making a determination of immunity in relation to draft article 7.

33. In respect of draft article 15 (Transfer of the criminal proceedings), a balance between the interests of the State of the forum and those of the State of the official was important. The approach to relations between the forum State and the State of the official reflected in paragraph 1 of the draft article built on existing State practice regarding the complementary nature of the jurisdiction of the forum State. His delegation noted that the "without prejudice" clause contained in paragraph 5 had been added to address concerns that the draft article, as previously worded, did not fully address relations with third States and could conceivably create a conflict with the obligation to extradite or prosecute established in respect of crimes under international law in various treaties. However, the paragraph had broader implications as currently worded, since the "without prejudice" provision was not limited to obligations of the forum State in relation to criminal matters. Instead, it was framed in general terms and appeared to encompass obligations of both the forum State and the State of the official, leaving room for possible action by third States. Since the general nature of the wording might not aid clarity, his delegation urged the Commission to reformulate paragraph 5 in order to narrow its focus.

34. It noted the inclusion of draft article 16 (Fair treatment of the official) as an additional safeguard provision, which echoed the safeguards contained in the Commission's draft articles on prevention and punishment of crimes against humanity, while also referencing human rights and international humanitarian law and imposing broad checks on abuses of personal and substantive rights. As the draft articles would apply against the general background of the applicable law at the national and international levels, the inclusion of that additional safeguard, in addition to those already provided for in international law, might be of merit.

35. His delegation noted the need to appoint a new Special Rapporteur for the topic. Given the challenges for consideration of the topic that transitions from one Special Rapporteur to another had presented in the past, it called on the Commission to take account of the stability and continuity that were vital to the outcome of its work on the topic when making that appointment. It also called on the Commission to be responsive to the views of States, particularly those of African States, with a view to ensuring that the draft articles left no room for the politicization already evident in international affairs.

36. **Ms. Von Usklar-Gleichen** (Germany), addressing the topic “Immunity of State officials from foreign criminal jurisdiction”, said that the adoption of the draft articles on immunity of State officials from foreign criminal jurisdiction on first reading constituted a significant milestone. The procedural safeguards represented the most substantial point of progress at the Commission’s seventy-third session, providing a useful starting point for harmonizing the application of the law on immunity by States and domestic courts. The commitment of Germany to the fight against impunity, especially for the most serious crimes under international law, continued to be a key tenet of its justice and foreign policy. The investigation and prosecution of crimes under international law by domestic prosecutors and courts, under certain conditions, constituted an indispensable element of its international criminal justice framework, including the German Code of Crimes against International Law, which had come into force in 2002 and provided a basis for the prosecution of certain crimes under international law, *inter alia* on the basis of universal jurisdiction.

37. At the same time, immunity, including that of State officials from foreign criminal jurisdiction, was a core element of the international legal system, based on the principle of sovereign equality of States. It constituted a functional basis of stable and peaceful inter-State relations. Her delegation believed that a reasonable balance between the need for effective prosecution of international crimes and the need for stability in international relations was best struck by States. Accordingly, a transparent distinction in the draft articles between *lex lata* and *lex ferenda* was essential. An extensive and clear methodological distinction between draft articles that represented established law and those that represented proposals for progressive development would help to secure their broader acceptance, since any substantial change of international law in that area proposed by the Commission would need to be agreed upon by States by treaty. The Commission’s impressive ground-laying

work was a good preparation for the topic to be taken up by a conference of States.

38. With regard to the draft articles adopted by the Commission on first reading, her delegation welcomed draft article 8 (Application of Part Four), which provided much needed clarity on the scope of application of the procedural part of the draft articles with regard to Part Two and Part Three, considerably aiding understanding of the relationship between the procedural provisions and safeguards and the substantive norms. On the other hand, the wording of draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), which was unchanged, remained a point of concern. The categorical formulation “shall not apply” used in paragraph 1 left room for potential misinterpretation and political misuse. Her delegation would like to see the Commission’s various reflections regarding the applicability of Part Four to draft article 7 included in the commentaries. That said, it considered the draft articles on procedural provisions and safeguards contained in Part Four to constitute, for the most part, proposals for *lex ferenda* that were not entirely supported by existing customary international law. Those provisions would find broad acceptance only if they reflected the different domestic legal systems and their specific approaches to finding an appropriate balance between effective criminal proceedings and stability in international relations.

39. With regard to the new paragraph 4 added to draft article 15 (Transfer of the criminal proceedings), her delegation’s position remained that a transfer should only occur if the State of the official was willing and able to properly prosecute the official. It was therefore of the view that the possibility of the forum State resuming its criminal proceedings if, after the transfer, the State of the official did not “promptly and in good faith” submit the case to its competent authorities for the purpose of prosecution, as proposed in the new paragraph, provided sufficient grounds for further discussion and would generate trust in the cases covered by draft article 7. Her delegation reserved the right to submit written comments and observations on the draft articles subsequently.

40. Turning to the topic “Sea-level rise in relation to international law”, she said that climate change continued to pose an existential threat to States, individuals and international security. In her delegation’s view, as set forth in a recent submission to the Commission explaining how the German authorities interpreted the rules regarding the stability of baselines established in the United Nations Convention on the Law of the Sea, a contemporary reading of those rules

gave coastal States the right to update their baselines when the sea level rose or fell or the coastline shifted but did not establish an obligation for them to do so. The extent to which individuals affected by rising sea levels were protected by international law was a question to which her delegation attached great importance. For that reason, it welcomed the attention accorded to the legal status of persons affected by sea-level rise by the Commission's Study Group on the topic. Her delegation agreed with the Co-Chairs of the Study Group that the existing legal frameworks potentially applicable to individuals affected by sea-level rise were fragmented and general in nature and that further studies were necessary.

41. The human-caused climate change that was the root cause of sea-level rise could only be addressed on the basis of international cooperation. With the second issues paper prepared by the Co-Chairs of the Study Group on the topic ([A/CN.4/752](#) and [A/CN.4/752/Add.1](#)), together with its report ([A/77/10](#)), the Commission had made an ambitious and significant contribution to the common task of mapping out the existing international legal framework, within which all States had a part to play in averting the worst-case scenarios. That framework must be examined to establish whether it provided sufficient protection for persons affected by sea-level rise. Where gaps were identified, new instruments that reflected the specific long-term consequences of sea-level rise might need to be developed.

42. Her delegation fully supported the Commission's future work on the topic in such areas of study as the human rights implications of sea-level rise, the scope of State obligations, the relevance of the principle of *non-refoulement*, the relevance of humanitarian visas, tools for the avoidance of statelessness and the content of the principle of international cooperation in the context of sea-level rise. Its further work on those issues would be pivotal in clarifying the role that existing and yet-to-be developed international law would play in guiding States' response to the challenge of sea-level rise. However, as there was little, if any, relevant State practice and *opinio juris* on which to base its work on what were, to an extent, novel legal questions, it was of the utmost importance that the Commission make a clear distinction between *de lege lata* findings and suggestions for the progressive development of international law. Her Government would continue to engage with partners, international organizations and academic institutions to promote discussion on the topic nationally and internationally.

43. **Mr. Talebizadeh Sardari** (Islamic Republic of Iran), addressing the topic "Immunity of State officials

from foreign criminal jurisdiction", said that his delegation had continuing concerns in respect of some of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading. In particular, it was disappointed that, despite disagreements echoed by several Member States and divergent views among members of the Commission, the commentary to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) had been adopted without changes to the version presented in 2017, beyond two minor updates. Furthermore, the draft article itself was not consistent with State practice and did not reflect customary international law. Although immunity was not equivalent to impunity, there should be sufficient, widespread, representative and consistent State practice to support limiting the scope of immunity in favour of greater responsibility and accountability on the part of State officials. His delegation was not yet convinced that the draft article reflected the codification of existing international law; rather, it should be regarded as a proposal for progressive development. His delegation also disagreed with the list of crimes enumerated in paragraph 1 of draft article 7 and the annexed list of international treaties referred to in paragraph 2. Since not all the treaties listed were universally accepted, the definitions contained therein also did not enjoy universal acceptance.

44. The dispute settlement clause included in draft article 18 would be relevant only if the draft articles were intended to become a treaty. While the Commission had yet to decide on the form that its final output would take, the views of Member States would be crucial in that regard. Given the sensitivity of the issue of immunity as a direct consequence of the principle of sovereignty, it was advisable for the Commission to proceed with caution. If the proposed framework for addressing the immunity of State officials failed to receive the endorsement of Member States, it would likely endanger inter-State relations and even the very objective of ending impunity for the most serious crimes of concern to the international community as a whole.

45. Concerning the topic "Sea-level rise in relation to international law", he said that it was impossible to turn a blind eye to the dangers associated with the rising global sea level, which threatened the existence of some States and could have tragic consequences including population displacement and food and water insecurity in the foreseeable future. With regard to the content of the second issues paper prepared by the Co-Chairs of the Study Group on the topic ([A/CN.4/752](#) and

A/CN.4/752/Add.1), and specifically the first of the possible modalities to maintain statehood without territory outlined in chapter V, section C, thereof, namely, “the ceding or assignment of segments or portions of territory to other States, with or without transfer of sovereignty”, his delegation wished to suggest a further possible modality for the Study Group’s consideration. That option would be for the affected State to transfer sovereignty over a portion of its territory to an international mechanism such as the International Seabed Authority or any other international organization that could act based on the scientific standards and rules of international law to ensure that the State’s resources were used for the benefit of its population. Several land territories, including Cambodia, East Timor, Kosovo and parts of Croatia, were currently, or had in the past been, administered directly by the United Nations, and the Study Group might look to those situations for guidance regarding the feasibility of that suggested option.

46. That said, it was important to recall that a key criteria of statehood, as defined in the Convention on Rights and Duties of States, was the possession of a defined territory. In addition, it was evident from the United Nations Convention on the Law of the Sea that States parties thereto enjoyed sovereign rights and exercised control over maritime zones based on the criterion of territory. Sea-level rise might inevitably lead to changes in baselines and, consequently, the outer limits of maritime zones and, in the event of land loss, maritime entitlements could be diminished or lost altogether. In other words, sea-level rise would ultimately affect the territory of States. However, any changes in baselines should be guided by the principles of equity and fairness.

47. Some Member States had expressed the view that the United Nations Convention on the Law of the Sea, as an instrument of a universal and unified character, should remain unchanged. However, *lex lata* appeared to be of little, if any, help when it came to addressing certain aspects of sea-level rise. Since the Commission should promote the progressive development of international law and its codification according to its Statute, and establishing future law fell beyond its mandate, his delegation wondered what its approach to those matters might be. As stated previously, his Government’s position was that, while the Convention was important as a general legal framework for activities in the oceans and seas, it was not the only legal framework governing those activities. Land reclamation, coastal fortification and other methods used to maintain coastal areas, base points, baselines and islands might be an appropriate response to sea-

level rise. However, they did not result in the creation of new rights for the States concerned and, as established in article 60, paragraph 8, of the Convention, artificial islands, installations and structures did not possess the status of islands. Any discussion of the relationship between artificial islands and changes in maritime zones in relation to sea-level rise was therefore irrelevant. Given its scientific nature, the topic of sea-level rise in relation to international law raised many complex questions. Since the exact scale and scope of the impact of sea-level rise on the planet was not yet known, certain aspects warranted further study. Accordingly, a functional, case-by case approach to each specific issue should be considered.

48. **Mr. Fox Drummond Cançado Trindade** (Brazil), speaking on the topic “Immunity of State officials from foreign criminal jurisdiction”, said that such immunity, which derived from the principle of sovereign equality of States, was important in that it enabled State officials to adequately perform their functions, particularly when they were not protected by existing multilateral conventions. It contributed to the stability of international relations in that it served to prevent criminal jurisdiction from being abusively exercised to serve interests other than justice. High-level State authorities must be protected against subordination to foreign domestic jurisdiction in relation to their official capacity, but not for personal benefit. At the same time, immunity should not mean impunity, and, from that perspective, it was important to recognize that the State of nationality might exercise its jurisdiction in some situations. In the case of serious crimes, it was also important to highlight rules such as *aut dedere aut judicare* and the complementary role of the International Criminal Court.

49. Regarding the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, it was his delegation’s understanding that the substantive and temporal elements of draft article 3 (Persons enjoying immunity *ratione personae*) and draft article 4 (Scope of immunity *ratione personae*) reflected customary international law, as recognized in the case law of the International Court of Justice. His delegation also understood draft article 5 (Persons enjoying immunity *ratione materiae*) and draft article 6 (Scope of immunity *ratione materiae*) to reflect customary international law. It supported the exceptions to the application of immunity *ratione materiae* set forth in draft article 7, which were intended to combat impunity for serious international crimes. It also welcomed the safeguards contained in Part Four of the draft articles, particularly the requirement for the forum State to examine the question of immunity before

initiating criminal proceedings or taking any coercive measures, as reflected in draft article 9. However, further discussion was needed on draft article 18, paragraph 2, concerning the settlement of disputes since it was not clear at the current stage whether a dispute settlement clause would be appropriate or desirable in the outcome of the Commission's work. If included, it should be general in nature, without compulsory language.

50. Regarding the topic "Sea-level rise in relation to international law", he said that, for Brazil, as a country with a coastline of almost 8,000 km and a coastal population of over 50 million persons, it was important to enhance understanding of the legal impact of sea-level rise. The Commission's contribution to the topic was important, as legal certainty was key to preventing disputes between Member States. His delegation reiterated its position that solutions to the complex problems arising from sea-level rise should be consistent with the provisions of the United Nations Convention on the Law of the Sea.

51. On the issue of statehood, his delegation noted that no situations in which the territory of a State had been completely submerged or rendered uninhabitable had yet been recorded. Established treaty law such as the 1933 Convention on Rights and Duties of States was therefore a useful source of guidance. In particular, article 1 of that Convention, which set forth the essential elements of the State, provided a reference for the Commission's work. However, while the characteristics cited in that article were essential to the creation of States, further consideration could be given to whether the preservation of those characteristics was indispensable to the continued existence of a State. A presumption of continuity might be an acceptable starting point for the Commission's consideration of that matter. States should cooperate in good faith, bearing in mind their common but differentiated responsibilities, as enshrined in principle 7 of the Rio Declaration on Environment and Development, since the States most affected by sea-level rise, especially small island developing States, were not the ones most responsible for climate change.

52. With regard to the subtopic of protection of persons affected by sea-level rise, it was relevant to examine existing international legal frameworks that were potentially applicable in that regard. Norms of international human rights law and international refugee law, such as the right to a nationality and the principle of *non-refoulement*, respectively, might prove useful to that examination. His delegation looked forward to the work on the subtopic of the law of the sea that the Study Group would carry out in 2023, and to the further work

on the subtopics of statehood and the protection of persons affected by sea-level rise scheduled for 2024.

53. **Ms. Solano Ramirez** (Colombia) said that the participation of Commission members in the meetings of the Sixth Committee, whether in person or virtually, was a great opportunity for members of the two bodies to exchange views and better work together. Speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", she said that her delegation welcomed the fact that the Drafting Committee had continued its consideration of the draft articles that had been referred to it previously by the Commission, as contained in the second (A/CN.4/661), seventh (A/CN.4/729) and eighth (A/CN.4/739) reports of the Special Rapporteur, and commended the Commission's adoption of the draft articles on immunity of State officials from foreign criminal jurisdiction, together with the commentaries thereto, on first reading. Her delegation continued to have concerns about draft article 18 (Settlement of disputes), which it considered to be a form of tacit acceptance of a specific judicial means. Given that States interpreted immunity from criminal jurisdiction in different ways, as had been made clear during the current debate, it would submit its written comments with the aim of contributing to the development of rules that were not only clear but also respected the sovereignty and legal system of each State.

54. Turning to the topic "Sea-level rise in relation to international law", she said that her delegation considered it to be an issue of the utmost importance that must be addressed without delay. The topic was related to many aspects of international law; its scope was far-reaching, as were the potential effects of the final outcome to be reached by the Commission. The effects of climate change, including sea-level rise, were the greatest challenge facing humanity. While the impacts would be felt throughout the planet, they would disproportionately affect some regions of the world, including Latin America and the Caribbean. In Colombia, it was estimated that 55 per cent of the population living on the Caribbean coast and 45 per cent of those living on the Pacific coast would in coming years be directly exposed to sea-level rise. The only possible response to those issues was for the international community to work in coordination and ensure that international law addressed the many challenges that had emerged and would continue to emerge. In that context, the work of the Study Group on the topic was vital. The two subtopics under its consideration at the Commission's seventy-third session, namely, statehood and the protection of persons affected by sea-level rise, had cross-cutting and dramatic implications. Identifying an appropriate

response under international law should be a priority for all States.

55. In that regard, her delegation was grateful to the Co-Chairs of the Study Group for their valuable and extensive work. While the scope of their research was large, the mapping of legal issues that might be affected by sea-level rise was an important step, as States would need to find mechanisms to prepare for current and future scenarios, the consequences of which were varied and multifaceted. Her delegation appreciated the opportunity offered by the Commission to provide information on its State practice and other information concerning to sea-level rise in relation to international law. The opportunity to provide observations was highly valuable, particular for developing countries like her own, and would help ensure that consideration of the topic included the needs and concerns of the international community as a whole. Regarding the subtopic of issues related to the law of the sea, her delegation urged the Study Group to consider all applicable sources of international law, which were not limited to the United Nations Convention on the Law of the Sea.

56. **Mr. Košuth** (Slovakia), speaking on the topic “Immunity of State officials from foreign criminal jurisdiction”, said that his delegation commended the Commission for the high standard of the draft articles on immunity of State officials from foreign criminal jurisdiction that it had adopted on first reading. His delegation concurred with the view expressed in the general commentary to the draft articles that the immunity of State officials from foreign criminal jurisdiction must not lead to impunity for the most serious crimes under international law.

57. His delegation appreciated the fact that the Commission had decided to address the relationship of the draft articles to international criminal jurisdiction in paragraph 3 of draft article 1 rather than in a stand-alone draft article, as had been previously proposed. With regard to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), his delegation noted the explanations provided in the commentary concerning the methodology used to develop the list of crimes provided in paragraph 1 thereof and recalled its previous concerns on that matter. Furthermore, it believed that the list of crimes should include the crime of aggression. His delegation reiterated its general support for the inclusion of the procedural provisions and safeguards in Part Four of the draft articles, considering that they contributed to the trust and cooperation between the forum State and the State of the official, bearing in mind the principle of the sovereign equality of States.

58. Turning to the topic “Sea-level rise in relation to international law”, he said that, with respect to the subtopic of statehood, the second issues paper on sea-level rise in relation to international law ([A/CN.4/752](#) and [A/CN.4/752/Add.1](#)) provided examples of the maintenance of international legal personality in cases of loss of territory and described issues relating to the phenomenon of sea-level rise and several possible alternatives for future work concerning statehood. While his delegation agreed with the view that sea-level rise was a global phenomenon that needed to be addressed at the international level, it suggested that the Commission should focus on legal aspects of the topic, in line with its mandate, and should not embark on issues of policy. It therefore called on the Commission to take a prudent approach in its discussion of possible alternatives regarding the preservation of international legal personality in cases of loss of territory, since such solutions were conditional on prior political agreement.

59. With regard to the subtopic of the protection of persons affected by sea-level rise, his delegation recognized that the applicable international legal framework was fragmented and general in nature, and that different categories of international law might be applicable, including human rights law, humanitarian law, refugee law, migration law, disaster law and climate change law. It therefore encouraged the Commission to examine in more detail whether existing instruments sufficiently protected persons affected by sea-level rise, while also taking into account, as proposed, its previous work on related topics, additional practice from States and the expertise of international organizations. The two subtopics should be considered in light of the observations regarding the law of the sea expressed in the first issues paper on the topic ([A/CN.4/740](#)) and any proposals on the subtopics must respect the principles of the United Nations Convention on the Law of the Sea and the integrity thereof.

60. **Ms. Veski** (Estonia), speaking on the topic “Immunity of State officials from foreign criminal jurisdiction” said that her delegation noted that the Commission had decided to transmit the draft articles on immunity of State officials from foreign criminal jurisdiction, adopted on first reading, to Governments for comments and observations, and that it had not yet decided whether to recommend that the draft articles should be used as a basis for the negotiation of a legally binding treaty. Her delegation welcomed the inclusion of a provision on the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal courts and tribunals in the draft articles, and the decision to include that provision in paragraph 3 of draft article 1 (Scope of the present draft

articles), as was her delegation's preference. Her delegation agreed with the Commission that it was important to reflect in the draft articles developments in the field of international criminal law, including the establishment of international criminal courts and tribunals. In that context, while the establishment of the International Criminal Court and its activities were of particular significance, the establishment of other international courts and tribunals and hybrid courts and tribunals also had a bearing on the development of international law. In that respect, it was worth recalling that discussions on the establishment of a special tribunal to address the crime of aggression committed in Ukraine were ongoing.

61. Several of the draft articles were devoted to facilitating communication between the forum State and the State of the official, including draft article 13, on requests for information between the two States, and draft article 17, on consultations between the States on matters relating to the immunity of an official covered by the draft articles. While her delegation was not opposed to the content of draft article 17, it doubted whether there was a need for a specific article on consultation, as consultation between two States was an established means of diplomatic communication and should always be possible. Paragraph 1 of draft article 18 (Settlement of disputes) set out an obligation for the forum State and the State of the official, in the event of a dispute concerning the interpretation or application of the draft articles, to seek a solution by negotiation or other peaceful means of their own choice. Her delegation maintained its view that a dispute settlement clause would only be relevant if the draft articles were intended to become a treaty. The peaceful settlement of disputes was an obligation of States Members of the United Nations and the parties to a dispute could choose suitable peaceful means of dispute settlement; the inclusion of such a clause in an international treaty was therefore appropriate. Her delegation also supported paragraph 2 of the draft article, which provided that the dispute should be submitted to the International Court of Justice if a mutually acceptable solution could not be reached, and did not provide the parties with the possibility of opting out of the Court's jurisdiction, as some international agreements did.

62. Turning to the topic, "Sea-level rise in relation to international law", she said that the fundamental pillar of ocean governance was the United Nations Convention on the Law of the Sea, which established the overarching legal framework within which all activities in the oceans and seas must be carried out. The second issues paper prepared by the Co-Chairs of the Study Group on the topic ([A/CN.4/752](#) and

[A/CN.4/752/Add.1](#)) gave a good overview of several problems arising from the possible legal effects or implications of sea-level rise. Her delegation welcomed the future programme of work and guiding questions proposed in the second issues paper.

63. Regarding the subtopic of statehood covered in the second issues paper, her delegation believed that the main goal should be the preservation of legal stability, security, certainty and predictability in international relations and appreciated the Study Group's efforts to interpret the main principles of international law in the context of the need for such stability. As mentioned in paragraph 75 of the second issues paper, there was no generally accepted notion of "State"; instead, reference was usually made to the criteria for the creation of a State: permanent population, defined territory, government, and capacity to enter into relations with other States and other subjects of international law. Her delegation agreed with the assertion that there were some situations, particularly in cases of loss of territory, where a State would not automatically cease to exist because it did not meet all those criteria. Estonia had faced such a situation, when it had lost control over its territory as a result of an unlawful occupation and illegal annexation, but it had retained its statehood and legal personality. Her delegation appreciated the various modalities presented by the Study Group for preserving the legal personality and territory of a State whose land was completely covered by the sea or became uninhabitable, and would follow with interest future discussions about the possibilities for a State to maintain its international legal personality without a territory. More than 70 States, representing almost one third of the international community, were – or were likely to be – directly affected by sea-level rise, making it a highly practical issue, especially for low-lying coastal States and small island States with an average elevation of only a few metres above sea level.

64. Regarding the protection of persons affected by sea-level rise, the reference in the second issues paper to the right to self-determination of Indigenous Peoples, in terms of power to organize themselves and handle their own internal and local affairs, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples and the American Declaration on the Rights of Indigenous Peoples, was of particular interest. Her delegation agreed with the Co-Chairs of the Study Group that enabling Indigenous Peoples to express their will in relation to decisions that could affect their future and that preserved their rights, including their right to maintain their identity, was an important issue that deserved further attention in the context of sea-level rise. Her delegation also strongly

supported the position of the Co-Chairs that the legal definition of “refugee” status set out in the Convention relating to the Status of Refugees and the Protocol thereto did not cover persons affected by climate change, including sea-level rise. That had also been affirmed by the Office of the United Nations High Commissioner for Refugees.

65. The issue of sea-level rise had created a number of questions related to international law that merited the consistent attention of the international community. Her delegation therefore welcomed the mapping exercise of the applicable legal frameworks and State practice. Additional discussion and analyses by the Commission of relevant international law, including law of the sea, were still needed and would have the support of her delegation.

66. **Mr. Sarvarian** (Armenia), speaking on the topic “Immunity of State officials from foreign criminal jurisdiction”, said that his delegation commended the Special Rapporteur for openly setting out her deductive approach to the progressive development of international law. The draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading were an example of the benefit resulting from a process whereby the Commission devoted the time required, in this case, some 15 years, to an important topic in a deliberative manner. The topic was also worthwhile in that the outcome was well suited to the traditional format of draft articles with commentaries. His delegation emphasized the importance of avoiding potential conflicts of obligations under different sources of international law. That pertained not only to substantive drafting but also to dispute settlement. In that regard, his delegation welcomed draft article 18, which set out the means for States to resolve potential conflicts of jurisdiction.

67. His delegation supported the retention of draft article 7, in which it was provided that immunity *ratione materiae* would not apply in respect of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance and noted the annexed list of treaties which clarified the scope of those crimes. Concerning paragraph 2 of draft article 4, his delegation questioned whether immunity *ratione personae* covered “all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office”. Due consideration would need to be given to the action to be taken on the draft articles following their adoption by the Commission on second reading.

68. Regarding the topic, “Sea-level rise in relation to international law”, he said that his delegation commended the continuation of the work of the open-ended Study Group on the topic, which would become increasingly significant in contemporary international relations as the effects of climate change continued to be felt. Pertinent issues identified by the Study Group, such as the protection of persons displaced by sea-level rise and the preservation of legal rights of States affected by sea-level rise, were already becoming relevant as the submergence of land began to take place. The Commission’s engagement with the work of expert bodies on the topic, notably, the Committee on International Law and Sea-Level Rise of the International Law Association, was valuable. It was important to take into account pertinent State practice that might be applied by analogy to the issues to be examined by the Study Group, including questions of statehood and those related to the preservation of maritime rights. There might also be merit in engaging in the progressive development of international law on the subject given that sea-level rise resulting from climate change was a phenomenon without precedent, and State practice, even by analogy, would not cover all issues that might arise.

69. His delegation recommended that the Commission take a decision in the near future concerning the scope of its work and potential outputs on the topic in order to enable it to effectively plan and structure its work. For certain issues, such as statehood and the protection of persons affected by sea-level rise, a report might be the best medium to communicate its findings, as had been the case for the topic “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”. For other questions, however, such as maritime entitlements, more tangible proposals for legal reform might be more suitable and would require careful consideration as to the way forward.

70. Regarding “Other decisions and conclusions of the Commission”, it was his delegation’s view that the establishment of the proposed trust fund to support the work of Special Rapporteurs, information on which was contained in annex II of the Commission’s report (A/77/10), could play an important role in mobilizing contributions from both public and private entities.

71. **Mr. McCarthy** (Australia), speaking on the topic “Immunity of State officials from foreign criminal jurisdiction”, said that his delegation appreciated the Commission’s work on the procedural aspects of the topic. The draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading were the product of much

work and much debate over a considerable period, including to reflect a range of views of Member States. The commentaries to the draft articles should clearly state where the Commission had sought to codify an existing rule of customary international law and where it had engaged in progressive development. Where the intention was codification, his delegation encouraged the Commission to continue to make efforts to identify the relevant State practice and *opinio juris* in support of the draft articles. In addition, the Commission should consider the extent to which Part Four of the draft articles, concerning procedural provisions and safeguards, mirrored States' existing obligations, was consistent with existing State practice and allowed for differences therein, noting the discretion afforded to States in implementing their international obligations.

72. His delegation would welcome further consideration of the level of detail required to codify the procedural aspects of immunity while allowing for a diversity of State practice in upholding immunity from criminal jurisdiction. Criminal justice was of the utmost importance and it was critical to maintain the delicate balance established by existing international obligations. His delegation further noted that, in its commentary to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), the Commission had acknowledged that a debate on the existence or non-existence of limitations and exceptions to immunity *ratione materiae* had been ongoing since 2016, including on the question of whether there had been a discernible trend in State practice or existing customary international law to support a conclusion on the matter. Unfortunately, it appeared that that debate remained unresolved. His delegation had previously expressed its regret at the Commission's provisional adoption of draft article 7 and the related annex by recorded vote during its sixty-ninth session in 2017. While draft article 7 and the related annex had been adopted without a vote during the Commission's seventy-third session in 2022, some Commission members had stated that the fact that no vote had taken place in 2022 did not mean that either the law or their legal positions on the issue had in any way changed.

73. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation welcomed the second issues paper prepared by the Co-Chairs of the Study Group on sea-level rise in relation to international law (A/CN.4/752 and A/CN.4/752/Add.1), which covered the subtopics of statehood and the protection of persons affected by sea-level rise. As an island continent, Australia had one of the largest maritime jurisdictions in the world and its Government was aware

that sea-level rise and other climate change impacts raised a multitude of complex and novel international law issues. Climate change was an existential threat for the Pacific region, especially States that had territories largely consisting of low-lying atolls, in respect of which there had been some speculation that they could potentially lose their statehood if their islands became completely inundated. Many people living in those and other island States in the Pacific faced difficult choices as rising sea levels inundated land, eroded coastlines and ruined arable land and freshwater sources. In some cases, communities had already had to relocate. Issues around the continuity of statehood in the face of sea-level rise and the protection of affected persons were politically and legally complex. As shown in the second issues paper, sea-level rise had the potential to adversely affect the enjoyment of human rights, including the right to life, the right to property, the right to adequate food and water, the right to health, the right to adequate housing and the right to cultural identity. However, the existing international law applicable to persons affected by sea-level rise was fragmented and did not clearly envisage scenarios involving any potential loss of statehood due to sea-level rise.

74. His delegation noted that the Study Group would revert to considering issues raised by sea-level rise in relation to the law of the sea in 2023. Since the Study Group had issued its first issues paper in early 2020, State practice had continued to develop in that area. In 2021, the Leaders of the Pacific Islands Forum, of which Australia was a member, had adopted the groundbreaking Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise. In that Declaration, they upheld the integrity of the United Nations Convention on the Law of the Sea while clarifying its interpretation, so as to preserve maritime zones established in accordance with the Convention in the face of sea-level rise. The interpretation of the Convention set out in the Declaration was supported by the Alliance of Small Island States, the Climate Vulnerable Forum, and the Organisation of African, Caribbean and Pacific States, and had also been noted by the Commonwealth Heads of Government.

75. **Ms. Stavridi** (Greece), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction" said that her delegation appreciated the Special Rapporteur's work on one of the most complex and sensitive topics on the Commission's agenda and commended the Commission for concluding the first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction.

76. Concerning the content of the draft articles adopted on first reading, her delegation welcomed the

placement of the compromise text concerning the relationship between the draft articles and the norms governing the functioning of international criminal tribunals in paragraph 3 of draft article 1, although it shared the concerns expressed by some Commission members, as described by the Chair of the Drafting Committee at the Commission's seventy-third session, regarding the reference to "international agreements", which did not seem to correspond to recent practice concerning the establishment of international courts and tribunals.

77. Neither the text of draft article 11 (Invocation of immunity) nor the commentary thereto reflected the point made by several States at the seventy-sixth session of the Sixth Committee that the invocation of immunity – a right of the State of the official, as the Commission had indicated in the commentary to the draft article – was not and should not be considered as a precondition to the application of immunity, since immunity, as noted by the Commission in the commentary to draft article 14, was part of international law. That point was only referred to in the commentary to draft article 14, paragraph 2, regarding the criteria to be taken into account by the forum State in making a determination about immunity. The Commission should therefore consider incorporating that clarification in the text of draft article 11 or, at least in the commentary thereto, and further elaborate on the effects of invocation or non-invocation of immunity on the obligation of the forum State to examine and determine immunity.

78. While her delegation believed that a waiver of immunity should not be revoked arbitrarily, it continued to have concerns about the inclusion of paragraph 5 of draft article 12, which expressly provided for the irrevocability of the waiver of immunity, given the absence of State practice in that area. Her delegation noted that the Commission had included in draft article 15, paragraph 3, a "without prejudice" clause similar to the clause in paragraph 4 (b) of draft article 14 providing that the subparagraph did not prevent "the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official". In the commentary to paragraph 3 of draft article 15, the Commission referred to the commentary to paragraph 4 (b) of draft article 14 as to the meaning and the scope of the "without prejudice" clause. Given that draft article 15 regulated the transfer of criminal proceedings by the forum State to the State of the official, her delegation questioned whether the examples of the measures contained in the commentary to paragraph 4 (b) of draft article 14 were also valid for the situation contemplated in draft article 15, paragraph 3.

79. Her delegation had supported the view expressed by some members of the Commission at its seventy-second session that it was critical to define the intended purpose of draft article 18 (Settlement of disputes) before deciding on its content and whether to include it. However, in its commentary to the draft article adopted on first reading, the Commission had indicated that, although its recommendation regarding the use of the draft articles was still pending, it had decided to include draft article 18 in order to give States the possibility to comment on it before the second reading of the draft articles and because the draft article followed "the logic underpinning the content and structure of Part Four of the draft articles". Her delegation found that the formulation of draft article 18 did not in fact support the purpose of Part Four, which was to provide procedural provisions and safeguards. On the one hand, the draft article referred to "a dispute concerning the interpretation or application of the present draft articles", which was phrasing usually employed when a treaty was envisaged and would not be used, for example, when a dispute or difference arose in relation to the determination or application of immunity in a specific case. On the other hand, the formulation of the draft article departed considerably from that of similar clauses adopted recently by the Commission, such as draft article 15 of the draft articles on prevention and punishment of crimes against humanity, which was mentioned in the commentary to draft article 18. If the intention of the Commission was to propose an additional procedural safeguard that would complement the guarantees included in Part Four and enable States to resolve differences relating to the determination and application of immunity at an early stage, thus avoiding a fait accompli and the consequent need to restore ex post facto international legality, draft article 18 should be formulated as a recommendation to States to try to resolve such differences as early as possible using, at their discretion, the means for peaceful settlement of disputes set forth in Article 33 of the Charter of the United Nations. Otherwise, as had been noted by several Commission members and Member States, a dispute settlement clause would only be relevant if the draft articles were intended to be used as the basis for a future treaty.

80. **Mr. Mora Fonseca** (Cuba), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction" said that his delegation commended the Commission for its work in elaborating the draft articles, with a view to a possible future treaty, and urged it to maintain consistency with its work on other related topics, such as crimes against humanity and preemptory norms of international law (*jus cogens*).

81. With regard to the procedural aspects of the topic, his delegation drew attention to the importance of balancing key principles such as respect for the sovereign equality of States, the need to combat impunity for international crimes and the protection of State officials from the politically motivated or abusive exercise of criminal jurisdiction. In doing so, the domestic law of States, which determined the application and scope of immunity, must be taken into account. Under Cuban domestic law, impunity did not exist for those responsible for violations of international law and crimes against humanity. It was also essential to uphold the principle that any intention to exercise jurisdiction over a foreign citizen who enjoyed immunity must be communicated in advance. The duty to notify should be seen as the first guarantee for a State to safeguard its interests by invoking or waiving such immunity.

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

83. As to the topic “Sea-level rise in relation to international law”, Cuba was aware that the United Nations Convention on the Law of the Sea did not have an answer to the questions raised by the topic. Nevertheless, it was essential to ensure unconditional compliance with the provisions of the Convention concerning maritime limits and boundaries, even when the latter underwent physical changes owing to sea-level rise. Maritime boundaries and baselines should not be subject to change as a result of sea-level rise. In addition to the legal uncertainty that such change would generate, small island States would also find it hard to assume the additional costs they would face as a result of losing natural resources vital to their economies.

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

85. Cuba was implementing various national plans to address and adapt to the impact of the loss of shorelines

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

86. **Mr. Kowalski** (Portugal), speaking on the topic “Immunity of State officials from foreign criminal jurisdiction”, said that, over the years, Portugal had consistently advocated that the Commission should strike a careful balance in the draft articles on immunity of State officials from foreign criminal jurisdiction between an understanding of immunity as essential to protect the legitimate rights of the State and a rights-based approach that was centred on the individual and allowed no complacency with respect to the commission of core international crimes for which no immunity should be granted. Given that the Commission had satisfactorily achieved such a balance in the draft articles as adopted on first reading, it was now important for it to clarify what it would recommend to the General Assembly concerning the final outcome of its work on the topic. As the Commission had pointed out in paragraph (2) of its general commentary to the draft articles adopted on first reading, it had, over the course of its history, approached the issue of immunity from multiple angles and with multiple objectives. Those past projects had culminated in the adoption of legally binding instruments, which had mainly codified customary international law. In his delegation’s view, the specific characteristics of the issue at hand did not warrant a departure from previous practice. The Commission should therefore proceed to the second reading of the draft articles with the intention of recommending that the draft articles be used as a basis for the negotiation of a future international treaty on the topic.

87. Turning to the draft articles themselves, as adopted on first reading, he said that his delegation’s comments were made without prejudice to any other comments that might be delivered in due course. His delegation was encouraged by the solution that the Commission had found to preserve the status of international criminal courts and tribunals, which played a vital role in the fight against impunity for the most serious crimes of international concern. It considered that the new paragraph 3 of draft article 1 would highlight the independence of the regimes applicable to immunity before national criminal courts and international criminal tribunals, and would safeguard the application of the legal frameworks applicable to the functioning of the latter; it would also ensure that the draft articles were

applicable to all States. His delegation understood the inclusion of Part Four of the draft articles concerning procedural provisions and safeguards to be a step towards compromise that addressed concerns about the misuse of proceedings against State officials. Ensuring that those procedural safeguards were part of international law would have a beneficial impact that far surpassed the scope of the draft articles themselves.

88. Turning to the topic “Sea-level rise in relation to international law”, he said that the legal questions concerning the multiple implications of sea-level rise must be urgently addressed. Examination of the topic raised some very complex and contentious issues. His delegation was pleased that the Commission had reconstituted the Study Group on the topic and commended its Co-Chairs for the high quality of the second issues paper ([A/CN.4/752](#) and [A/CN.4/752/Add.1](#)). That paper included extensive relevant information, including with regard to the existing and emerging practice of States, international organizations and other relevant entities, as well as available scientific data and the different sources of law. While international law had a very important role to play in addressing the global threat of sea-level rise, a phenomenon that affected all States and millions of people, it was clear that the applicable legal framework was somewhat fragmented. His delegation therefore welcomed the Co-Chairs’ intention of approaching the issues of statehood and the protection of persons affected by sea-level rise from the perspectives of both existing law and progressive development. The relevance of the Study Group’s continued discussions on the basis of the second issues paper was evident from the fact that sea-level rise could put more than 800 million people in coastal cities at direct risk by 2050.

89. His delegation’s full statement would be made available to the Secretariat for posting on the Committee’s website.

90. **Ms. Arumpac-Marte** (Philippines), speaking on the topic “Immunity of State officials from foreign criminal jurisdiction”, said that her delegation noted the transmission of the 18 draft articles on immunity of State officials from foreign criminal jurisdiction, as adopted by the Commission on first reading, to Governments for comments and observations. It reiterated that the topic must be approached with the aim of balancing respect for the sovereign equality of States and protection of State officials from politically motivated or abusive exercise of criminal jurisdiction, on the one hand, with the recognized need to address impunity for international crimes, on the other.

91. Turning to the topic “Sea-level rise in relation to international law”, she said that, as an archipelagic State with numerous low-lying coastal areas that were highly vulnerable to sea-level rise and its effects, the Philippines was following closely the work of the Commission in that regard. Continued progress was needed, especially with regard to the Commission’s consideration of the subtopics of sea-level rise in relation to statehood and the protection of persons affected by sea-level rise. Her delegation therefore welcomed the reconstitution of the Study Group on the topic and its exchange of views on the second issues paper ([A/CN.4/752](#) and [A/CN.4/752/Add.1](#)) prepared by its Co-Chairs.

92. It was her delegation’s understanding that the second issues paper was exploratory in nature and that the aim was to establish a list of international law issues to be analysed from the perspective of both *lex lata* and *lex ferenda*. Those issues should be approached on the basis of legal stability, security, certainty and predictability in international law. With regard to sources of law, her delegation noted that the Commission was taking into account treaties, customs and applicable general principles of law, including principles of equity, good faith and international cooperation. Her delegation also endorsed the principle of common but differentiated responsibilities in relation to statehood and sea-level rise and reaffirmed its belief that the United Nations Convention on the Law of the Sea set out the legal framework within which all activities in the oceans and seas must be carried out.

93. On statehood, the criteria that a State had to meet in order to be considered a subject of international law, in accordance with the 1933 Convention on Rights and Duties of States, were an appropriate starting point for the work of the Co-Chairs. It had been said that, while statehood was a central concept of international law, it was one of “open texture”. While her delegation would support the maintenance of the current legal status, international law tended to develop as new realities emerged. Hence, the doctrine that statehood once established would subsist might have to be reconciled with a situation in which one essential element of statehood was no longer present. In other words, the criteria for statehood would have to be liberally construed. In that regard, James Crawford, in his work entitled *The Creation of States in International Law*, had suggested that the requirement of territory was rather a constituent of government and independence than a distinct criterion of its own. When one of the elements of statehood was missing, a pragmatic approach should be taken with a view to favouring stability and predictability in international law, whilst being mindful

of specific circumstances. The alternatives set out by the Co-Chairs in their second issues paper, namely, presumption of continuity of statehood, albeit with an acknowledgement of the practical problems arising therefrom; or maintenance of some form of international legal personality without a territory, similar to the historical examples mentioned in relation to various modalities, were consistent with that approach.

94. With regard to the protection of persons affected by sea-level rise, her delegation agreed with the observation made by the Co-Chairs of the Study Group, in the second issues paper, that the potentially applicable international legal frameworks currently in existence were fragmented and general in nature. The Philippines therefore endorsed the proposal that the existing framework could be complemented to address the long-term consequences of sea-level rise and take account of the fact that affected persons might remain in situ, be displaced within their own country or migrate to another State. On the last point, the Philippines had experience with regard to regulatory frameworks for international migration, many of which were non-binding in nature, and stood ready to share its State practice with the Commission. For example, the Global Compact for Safe, Orderly and Regular Migration, with the aim of mitigating the adverse drivers that compelled people to leave their country of origin, expressed States' commitment to developing adaptation and resilience strategies to, inter alia, slow-onset natural disasters, the adverse effects of climate change, and drought and sea-level rise, taking into account the potential implications for migration, while recognizing that adaptation in the country of origin was a priority. It also contained a call for the development of coherent approaches to address the challenges of migration movements in the context of slow-onset natural disasters, including by taking into consideration relevant recommendations from State-led consultative processes.

95. Her delegation shared the Co-Chairs' assessment that, while relevant State practice was still sparse at the global level, it was more developed in States already affected by sea-level rise. States in the South-East Asian region were highly vulnerable to the impact of climate change, as had been acknowledged in the joint vision statement of the Association of Southeast Asian Nations (ASEAN)-United States of America Special Summit 2022, which contained a clear commitment by ASEAN and the United States to intensify their partnership to bolster the Association's capacity to enhance disaster resiliency and adapt to the effects of climate change, including rising sea levels. The joint vision statement could serve as evidence of State practice regarding international cooperation, for example.

96. According to the 2021 ASEAN State of Climate Change report, six countries in the region, including the Philippines, were vulnerable to sea-level rise. In that report, reference was made to the wide-ranging consequences of sea-level rise in some ASEAN countries, including the impact on freshwater aquifers in coastal areas due to seawater intrusion affecting coastal ecosystems, agriculture production and drinking water supply, and the effect on livelihoods. The protection of affected persons who remained in situ or were internally displaced would be particularly relevant in that regard.

97. Her delegation noted the Commission's focus on the legal aspects of the topic, in accordance with its mandate to progressively develop and codify international law. However, in identifying emerging State practice, it should also take into consideration the policies and related instruments of individual States, in particular specially affected States, and regional organizations.

98. **Mr. Smyth** (Ireland) said that, at the start of the new quinquennium, the members of the Commission should seriously consider reducing the number of topics on the Commission's programme of work. That would allow States to consider the remaining topics more thoroughly and provide more extensive views and examples of practice, which would ultimately benefit the work of the Commission.

99. Speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", and referring to the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, he said that his delegation, as a strong supporter of accountability, agreed with the inclusion of a "without prejudice" provision to address the relationship between the draft articles and the rules governing international criminal courts and tribunals. It supported the proposed positioning of that provision as draft article 1, paragraph 3; however, it also agreed with the concerns expressed in the Drafting Committee – and mentioned in the commentary to draft article 1 – that the current formulation appeared too restrictive. While the wording of the provision was modelled on the United Nations Convention on Jurisdictional Immunities of States and Their Property, the proposed text did not correspond with recent practice concerning the creation of international criminal courts and tribunals, since it did not extend to those that had not been established by international agreement, such as those created by the Security Council. In his delegation's view, the provision should not be limited to criminal courts and tribunals established by international agreement; the Commission should therefore give further consideration to the

formulation of the paragraph in order to achieve the intended goal.

100. His delegation noted the apparent continuing divergence of views within the Commission on draft article 7. It welcomed the additional safeguards regarding that draft article that had been introduced by the inclusion of draft article 14, paragraph 3. Furthermore, in view of the possibility that the implementation of the draft articles in any given case could give rise to disagreements or misunderstandings between States, Ireland also supported the inclusion of draft article 17 (Consultations) as a useful mechanism whose purpose was to prevent conflict between the forum State and the State of the official in question, and to protect stability in international relations. His delegation noted that the inclusion of draft article 18 (Settlement of disputes) was closely related to the final form of the draft articles and the recommendation to be addressed by the Commission to the General Assembly in due course. It remained of the view that, should that final form be an international agreement, a dispute settlement provision would form an important part of safeguards aimed at protecting the stability of international relations and avoiding prosecutions that were politically motivated or abusive. While his delegation noted that the Commission had not yet recommended a proposed outcome for the topic, it welcomed the opportunity for States to consider the full set of draft articles, including the interplay between them, and to provide their comments and observations thereon to the Commission.

101. Turning to the topic “Sea-level rise in relation to international law”, he said that the impact of sea-level rise would be disproportionately felt by people in low-lying areas and in developing countries, particularly small island developing States. As an island State itself, Ireland was very aware of the urgency of the issue. It was crucial to consider the legal aspects of the impact of sea-level rise. In that regard, the work of the Commission was already helping to identify gaps in the relevant legal framework. The United Nations Convention on the Law of the Sea would clearly be a key consideration in any response to the challenges faced.

102. His delegation noted the many complex and novel legal issues raised in the second issues paper prepared by the Co-Chairs of the Study Group on the topic (A/CN.4/752 and A/CN.4/752/Add.1) and in the discussion of that paper by the members of the Study Group, as summarized in the Commission’s report (A/77/10). There were few, if any, legal precedents for the current situation. It also noted that, in the absence of specific legal rules addressing some of the issues faced,

an examination of potentially relevant general principles of law might be necessary.

103. With regard to the subtopic on issues related to the law of the sea, to which the Study Group would revert in 2023, Ireland had recently carried out a full resurvey of the points from which its system of straight baselines and its bay closing lines were drawn and had subsequently amended the national laws prescribing those straight baselines and bay closing lines. However, its practice in that area to date had not been expressly formulated to take account of sea-level rise.

104. **Ms. Aagten** (Netherlands), speaking on the topic of immunity of State officials from foreign criminal jurisdiction, said that, over the years, her delegation had repeatedly voiced its concerns about the development of the topic, especially in view of the absence of State practice and *opinio juris* and of the conceptual underpinnings of the project. Regrettably, the draft articles on immunity of State officials from foreign criminal jurisdiction, as adopted by the Commission on first reading, continued to give rise to those concerns. Her Government would request its Advisory Committee on Issues of Public International Law to provide it with independent advice on those draft articles, which it would take into account when preparing its written comments and observations on the topic.

105. With regard to the topic “Sea-level rise in relation to international law”, rising sea levels had consequences for all parts of the Netherlands, since some areas of its Caribbean islands were not far above the current sea level and might lose a significant amount of land territory as a result of further sea-level rise, while 26 per cent of its European land territory currently lay below sea level, a percentage that was likely to rise as the sea level rose.

106. The subtopic of statehood was highly relevant and the Commission’s discussions were crucially important for States that were directly affected by sea-level rise, especially small island developing States that could be at risk of losing their statehood as a result of rising sea levels. It was her delegation’s understanding that the criteria for statehood contained in the 1933 Convention on Rights and Duties of States were the point of departure for discussions on statehood and sea-level rise. Those criteria were concerned with the creation and existence of a State as an international legal person and constituted a general legal framework for questions of the continuity of statehood. However, State practice showed that they were not applied in the same manner to cases relating to the creation of States and cases regarding the continuity or extinction of States; there was a strong presumption in favour of the continuity of

statehood, even in cases in which one or more criteria were no longer met. For example, as referred to in the second issues paper prepared by the Co-Chairs of the Study Group on the topic ([A/CN.4/752](#)), there had been situations where a Government had been set up in exile on behalf of a State affected by the foreign occupation of its territory, in respect of which the international community had presumed the continuity of the legal personality of the State concerned. Such cases had in common that the non-fulfilment of one or more criteria for statehood was considered by the international community to be of a temporary nature. The loss of land by a State as a result of sea-level rise could, most probably, not be considered temporary. Nonetheless, the aforementioned precedents were still relevant, since they demonstrated that prolonged situations in which one or more criteria for statehood were not met could be addressed under international law and that the non-fulfilment of one or more of those criteria did not automatically lead to the extinction of a State as an international legal person. Along the same lines, there was, a priori, no reason why a State that lost its territory because of sea-level rise would automatically lose statehood as a result. Thus, her Government recommended a further study into the differences in interpretation and application of the criteria for statehood with regard to the creation of States, on the one hand, and the continuity and extinction of States, on the other, an aspect that was not covered in the second issues paper. With regard to the continuity of statehood, particular attention could be paid to the possible relevance of specific rules and principles of international law, such as the right of self-determination of peoples, in addition to the presumption of temporality of the situation.

107. Her Government would also support further discussion of international law on the question of sea-level rise in relation to the protection of persons. A rising sea level might impact not only States themselves but also those living on lands belonging to States. Recent jurisprudence of the Human Rights Committee had shown the impact of sea-level rise on the effective enjoyment of human rights. The Netherlands therefore welcomed the presentation of issues warranting further study, as set out in the second issues paper and the report of the Study Group reproduced in the Commission's report ([A/77/10](#)), especially concerning obligations under international human rights law, *non-refoulement* obligations and the concept of international cooperation. Her Government welcomed the reference in the report of the Study Group to the fact that the Human Rights Council had recognized the right to a clean, healthy and sustainable environment. The said right had also been recognized by the General Assembly in July 2022. Her

Government recommended that the Study Group consider the added value brought by the right to a clean, healthy and sustainable environment in relation to sea-level rise.

The meeting rose at 5.50 p.m.