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Summary record of the 28th meeting
Held at Headquarters, New York, on Tuesday, 1 November 2022, at 10 a.m.

Chair: Mr. Afonso . . . . . (Mozambique)
later: Mr. Leal Matta (Vice-Chair) . . . . . (Guatemala)
later: Ms. Romanska (Vice-Chair) . . . . . (Bulgaria)

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22-24600 (E)

The meeting was called to order at 10 a.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. Challenger** (Antigua and Barbuda), speaking on behalf of the Alliance of Small Island States and addressing the topic "Sea-level rise in relation to international law", said that the 39 small island developing States, which were particularly vulnerable to the unprecedented and relentless rise in sea levels, had been very closely engaged in discussions surrounding the issue and were determined to be involved in the development and application of international law that affected them. In the Alliance of Small Island States Leaders' Declaration 2021, the Heads of State and Government of the Alliance had affirmed that there was no obligation under the United Nations Convention on the Law of the Sea to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations. They had also affirmed that such maritime zones and the rights and entitlements that flowed from them should continue to apply without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise. The Alliance was heartened to see that other States, including some of the largest coastal States, had adopted a similar understanding of international law and had recognized the need for legal stability, security, certainty and predictability.

3. Turning to the second issues paper prepared by the Study Group on sea-level rise in relation to international law (A/CN.4/752 and A/CN.4/752/Add.1), she said that for the Alliance, State practice over the past two centuries in respect of statehood was abundantly clear. The Montevideo Convention on the Rights and Duties of States was not relevant to the question of continuation of statehood; rather, after a State's initial creation, there was a fundamental presumption of continuity of statehood in international law, a principle that had existed since the Peace of Westphalia and had been consciously applied multiple times. Such a presumption was logical, since the continued existence of States was foundational to the current rules-based international order. Furthermore, over the past century, the international community had recognized Governments in exile that had lost control of their territory; it had allowed States to resume independent statehood and re-join the United Nations after choosing to merge with other States; and, in some cases, it had even allowed States that no longer had a defined land territory to continue to exist.

4. In view of that long practice, it was inequitable and unjust to now suggest that, in the context of rising sea levels, States must adhere to criteria developed in a regional agreement that had been signed nearly a century ago and had been ratified by just 16 States. Moreover, the potential loss of land territory that small island developing States faced as a consequence of sea-level rise was an anthropogenic phenomenon, not a natural one; to use an analogy, it was as if their land territory was being invaded as a result of the actions or inactions of other States. To deprive the affected States of their sovereignty would be contrary to a century of State practice as well as to the Alliance's interpretation of the relevant law, and would also represent an unacceptable exertion of power by larger States that was contrary to the principle of self-determination enshrined in the common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which established the right of all peoples to "freely determine their political status and freely pursue their economic, social and cultural development". The members of the Alliance believed that, once a State had been created by a people expressing their right to self-determination through statehood, that statehood would cease only if another form of expression of the right to self-determination was explicitly sought and exercised by the people. The exercise of that right was the only determinant of the State's continuity.

5. To address the global challenge of protecting persons affected by sea-level rise, the Alliance considered meaningful inter-State cooperation essential. Cooperation was more than a policy imperative; it was a legal obligation for all States. The duty of cooperation was a general principle of international law rooted in the Charter of the United Nations, the Universal Declaration of Human Rights and the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States. That duty, which obligated the international community to assist the States most affected by sea-level rise, was also a foundational principle of international human rights law, environmental law and disaster law – the three legal regimes most relevant to the phenomenon.

6. Under international human rights law, the duty to cooperate required developed States to provide assistance to developing States in ensuring human rights within their jurisdiction. It was limited only by the extent of developed States' available resources, was

enshrined in multiple international and regional agreements and was supported by significant State practice. Under international environmental law, States were required to approach all international environmental issues in a cooperative manner, providing meaningful support to other States while working towards shared environmental goals. Specifically, developed States had a duty to provide financial, technical and scientific assistance and to cooperate in the prevention of transboundary environmental harm. Under international disaster law, the duty to cooperate meant working together to enhance resilience. The duty was incumbent upon all States, but non-affected States had a particularly strong obligation to provide adequate, timely and sustainable assistance to developing States directly affected. The principle of cooperation was integral to the international disaster agreements that formed the backbone of the modern humanitarian system, besides being supported by decades of State practice in the context of disasters.

7. Apart from being a legal obligation, cooperation was a matter of equity. The States of the Alliance were among the world's lowest emitters of the greenhouse gases that drove climate change and sea-level rise, yet were facing some of the most severe consequences of rising sea levels. To expect small island States to shoulder the burden of sea-level rise alone, without assistance from the international community, would be the pinnacle of inequity.

8. In response to the suggestion that sea-level rise could be addressed under the Commission's draft articles on the protection of persons in the event of disasters, and notwithstanding the content of paragraph (4) of the commentary to draft article 3 thereof, contained in the report of the Commission on the work of its sixty-eighth session (A/71/10), the members of the Alliance wished to highlight that, while the effects of sea-level rise were certainly "disastrous", sea-level rise was not a "disaster". Disasters were natural phenomena. Sea-level rise was a consequence of anthropogenic climate change and its impact on human mobility was the result of multiple factors, including exposure, vulnerability and lack of capacity. The draft articles on the protection of persons in the event of disasters had been developed in the context of events for which there was no State responsibility. In the context of climate change, the situation was very different. Responsibility for climate change was shared among the largest emitting States in the international community, and those States must also share the legal duty to cooperate to mitigate its adverse effects.

9. **Ms. Rivlin** (Israel), addressing the topic "Immunity of State officials from foreign criminal jurisdiction", said that, although international efforts to fight crime and combat impunity were of great importance, the fundamental rules on immunity of State officials from foreign criminal jurisdiction had long been firmly established in the international legal system, with good reason. Their purpose was to protect the principles of State sovereignty and equality, prevent international disharmony and the political abuse of legal proceedings, and enable State officials to perform their duties without impediment. That rationale remained as important and central to international law and international relations as it had always been.

10. Her delegation took note of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, along with the request by the Commission to receive comments and observations regarding the draft articles. Her delegation requested that its comments on the topic in previous years be considered together with the current statement.

11. Israel continued to believe that some of the draft articles did not reflect customary international law and instead constituted proposals for the progressive development of international law. If the Commission's intention was to make recommendations for progressive development, it should openly acknowledge that fact. In particular, it should clearly distinguish between provisions that codified existing customary international law and provisions that constituted proposals for progressive development or suggestions for entirely new norms.

12. With regard to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), she recalled that some members of the Commission had voted against the text at the sixty-ninth session (2017) and that their positions remained unchanged despite the adoption of the text, as indicated in paragraph (3) of the commentary to the draft article, contained in the Commission's report (A/77/10). Her delegation's position, which was shared by other States and several members of the Commission, was also unchanged, despite the adoption of the text on first reading. The draft article did not reflect the current state of international law. The exception set out in the draft articles did not apply when officials acted in the conduct of their official duties, as a number of domestic courts had confirmed, and there was insufficient supporting State practice and *opinio juris* to support that exception. Either the draft article should be removed or, if it was retained in the second-reading text, the Commission should make clear that its provisions constituted a proposal for progressive development only.

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

14. Her delegation welcomed the decision to remove the draft article 18 proposed by the Special Rapporteur in her eighth report (A/CN.4/739) addressing the relationship between the draft articles and the rules governing the functioning of international criminal tribunals, which had been redundant and had served a source of confusion. It also noted the incorporation of a without prejudice clause in paragraph 3 of draft article 1 and welcomed the removal of the commentary that had accompanied that draft article 18, in particular the references to the highly controversial and widely criticized judgment of the International Criminal Court in the *Jordan Referral re Al-Bashir Appeal*. It likewise welcomed the progress made with regard to procedural safeguards, notwithstanding its position on draft article 7, and intended to submit specific comments and observations in that regard.

15. Her delegation welcomed the progress made by the Commission with regard to procedural safeguards and appreciated the adjustment to the wording of paragraph 1 of draft article 14 (Determination of immunity), as it agreed that immunity should be determined by the competent authorities of the forum State, which were not necessarily its courts. Her delegation wished to reiterate in that connection that specific determinations regarding the immunity of a foreign official should be considered by decision makers in the forum State at the highest level, and only after consultation with the State of the official, given that decisions on whether to institute a criminal investigation carried the risk of violating the official's immunity under customary international law. Bilateral consultations allowed the forum State to examine all relevant information, including issues of subsidiarity, thereby preserving the stability of international relations and the sovereign equality of States. As previously articulated by several members of the Commission, no proceedings against the official should be initiated before such consultations had taken place.

16. Her delegation was not supportive of the mechanism described in paragraph 2 of the current draft article 18 (Settlement of disputes), which indicated that either one of the States concerned could refer the dispute to the International Court of Justice unilaterally. In its view, the International Court would be an appropriate forum for the resolution of disputes concerning a determination of immunity only if all the States involved consented to the referral. Her delegation would be submitting detailed comments and observations on various aspects of the draft articles and encouraged the Commission to dedicate the necessary time and effort to reviewing the significant and sometimes controversial issues that had been raised before the Committee.

17. Turning to the topic of sea-level rise in relation to international law, she said that Israel was committed to the global fight against climate change and acknowledged the existential threat to humanity that it constituted. Climate change-related sea-level rise was a threat not just to low-lying and small island States, but to all States, both directly and indirectly, and had potentially far-reaching implications for key underpinnings of the international legal order, including the principles of legal stability, security and predictability. On the issue of statehood, her delegation agreed with the Co-Chairs of the Study Group on sea-level rise in relation to international law that, given the sensitivity of the subject and the considerable caution it warranted, the Commission should be careful not to prejudge or put forward premature conclusions in its preliminary reflections on the topic.

18. **Ms. Bartley** (Samoa), speaking on behalf of the Pacific small island developing States and addressing the topic "Sea-level rise in relation to international law", said that there was an urgent need for action to address the existential threat posed by sea-level rise at all levels and in all sectors, in view of the conclusion, set forth in recent reports of the Intergovernmental Panel on Climate Change, that, based on current projections, the central aim of limiting the global temperature rise to no more than 1.5°C above pre-industrial levels established in the Paris Agreement was unlikely to be achieved. Although the Intergovernmental Panel's specific projections on sea-level rise were not encouraging, the two issues papers prepared by the Study Group on sea-level rise in relation to international law (A/CN.4/740, A/CN.4/740/Corr.1 and A/CN.4/740/Add.1, and A/CN.4/752 and A/CN.4/752/Add.1) provided an important foundation on which to build legal solutions to the challenges ahead.

19. The relationship between climate change-related sea-level rise and maritime zones had not been taken into account by the drafters of the United Nations Convention on the Law of the Sea, which provided the legal framework within which all ocean and sea

activities should be carried out. Thus, in 2021, the leaders of the Pacific Islands Forum had issued a formal statement, known as the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, setting out how they believed the rules on maritime zones set forth in the Convention should apply in the context of rising sea levels.

20. The view they set forth was that, once maritime zones had been established and the Secretary-General of the United Nations had been duly notified in accordance with the Convention, the zones, and the rights and entitlements flowing therefrom, should continue to apply, without reduction, irrespective of any physical changes connected to climate change-related sea-level rise. As the Declaration made clear, that approach was supported by the Convention and its underlying principles. Contrary to the impression that other delegations might have given in earlier discussions on the topic, the Declaration did not formally constitute an extra-legal circumvention of the Convention and did not establish new international law. Rather, it represented an interpretation of the existing law of the sea, as reflected in the Convention, which States that were not members of the Pacific Islands Forum, including those that were not parties to the Convention, were welcome to endorse and apply.

21. On the issues of statehood, statelessness, sovereignty and self-determination, which were directly relevant to Pacific small island developing States in view of the ever-increasing possibility of their territories being entirely submerged or depopulated as a consequence of climate change-related sea-level rise, she said that there must be a strong presumption of continuity of statehood once a State had been created. The criteria for statehood set forth in the Montevideo Convention on the Rights and Duties of States and similar instruments were more relevant to the creation of States than to their extinction. The views of States particularly affected by climate change-related sea-level rise should be taken into account in all discussions on statehood. Accordingly, the Pacific small island developing States welcomed the acknowledgement in the second issues paper (A/CN.4/752) that, "with regard to small island developing States whose territory could be covered by the sea or become uninhabitable owing to exceptional circumstances outside their will or control, a strong presumption in favour of continuing statehood should be considered."

22. The multi-dimensional threats that small island developing States faced as a consequence of sea-level rise extended beyond coastal erosion to loss of habitable land, increased salinity levels in freshwater sources, increased risk of flooding and increased vulnerability to natural disasters in all aspects of life, whether socioeconomic, environmental or cultural. The consequences could not always be addressed through adaptation strategies and improved infrastructure; some coastal communities in the Pacific were already being forced to relocate. The second issues paper provided a useful mapping of existing legal frameworks potentially applicable to the protection of persons affected by sea-level rise.

23. The position of the Pacific small island developing States was that, under international law, the international community had a duty to cooperate and to help vulnerable States cope with the adverse impact of sea-level rise on their citizens, whose fears of losing their ancestral homes and being forced to leave were real and valid. The need to address and clarify, based on fairness and justice, the international law implications of climate change-related sea-level rise for statehood and the obligations regarding the protection of persons was thus urgent.

24. **Mr. Nyanid** (Cameroon), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that his delegation wished to reiterate its vision of immunity as a logical consequence of State sovereignty. It was essential that, in performing their official duties, those who represented and acted on behalf of their State both nationally and internationally did not feel constrained by a sword of Damocles hanging over their heads. His delegation urged the Commission to continue its consideration of the topic with a view to achieving a final outcome that was more consistent with, inter alia, its work on peremptory norms of general international law (*jus cogens*).

25. Referring to the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading and addressing the form thereof, he said that the Commission should present them taking into consideration their legal chronology and linkages, to make them easier to read and understand, as it had done with its previous outputs.

26. With regard to the substance of the draft articles, his delegation took note of the Commission's efforts to determine the scope of application of the immunity of State officials from foreign criminal jurisdiction in draft article 1, although it would have preferred to see the special legal regimes applicable to international criminal courts and tribunals, which were referred to in paragraph 3 of the draft article, included within the scope of the draft articles as a matter of principle. Such an approach would have been consistent with draft article 3 (Persons enjoying immunity *ratione personae*) and draft article 4 (Scope enjoying immunity *ratione*

personae), given the possible consequences of the activities of international criminal courts and tribunals for the existence of international rules that placed States under an obligation to cooperate with them.

27. Those special regimes were not universal and, in any event, even though draft article 1 did not reflect that fact, a *sui generis* immunity regime was intrinsically created by any mechanism that was intrinsically connected to the institutional frameworks of some of the agreements establishing those special regimes, or simply by any process of legal engineering that conferred immunity upon the officials of certain States within a criminal law system developed supposedly as a novel tool for fighting impunity in all places and all circumstances.

28. The reference to the special regimes of international criminal courts and tribunals might thus be interpreted as creating a special, discriminatory criminal law, even though such a provision would be inoperative in that it undermined the very foundation of international law. States should not be put under any pressure and should be free to consent to be bound by the agreements of their choice; certain agreements constituted veritable legal straitjackets, containing legal impasses that might lead some to believe that mechanisms intended to prevent impunity were biased and discriminatory. However, his delegation continued to believe in fairness and equal treatment, without which international law had no meaning. It was important to bear in mind that, in international law, any attempt to restrict States' freedom of action outside of established frameworks was deemed unlawful.

29. It was in order to prevent such violations that the concept of immunity was created to shield its beneficiaries from any responsibility, because it was, and should remain, a derogation from ordinary law and a privilege allowing officials, by virtue of their status, to be exempt from the jurisdiction of another State. However, immunity from foreign criminal jurisdiction by no means eliminated the application of the principle of responsibility and the prevention of impunity for the most serious crimes of international law. It was also, of course, important to note that persons benefiting from immunity remained liable to prosecution, subject to the modalities of the legal and institutional framework of each State or within an established framework of cooperation between States. It was only when the State of the official was unable to bring legal proceedings against him or her that the forum State could, upon request, take its place, and international law provided appropriate mechanisms for such situations.

30. His delegation welcomed the approach that the Commission took in draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* does not apply), where it reproduced many of the crimes listed in article 5 of the Rome Statute of the International Criminal Court. However, several of the crimes listed in the draft article were based on the practice of a small number of States and did not reflect customary international law. It would therefore be desirable for the Commission to review the wording of that draft article with a view to achieving a consensus that would allow for the adoption of the draft articles as an international convention, something which was currently a distant prospect.

31. The procedural safeguards contained in Part Four of the draft articles were important in that they served to ensure due respect for the immunity of State officials from foreign criminal jurisdiction. It was therefore desirable for the Commission to give States some flexibility to address the circumstances of each case. In that context, draft article 9 (Examination of immunity by the forum State) was legally questionable. His delegation's position remained that, when the competent authorities of the forum State became aware that an official of another State might be affected by the exercise of its criminal jurisdiction, they should only consider criminal proceedings once the official's immunity had been lifted and should promptly discontinue any criminal proceedings or coercive measures that might affect the official, including those that might affect any inviolability that the official enjoyed under international law, as a minimum courtesy between States.

32. The draft article should be reworked to remove any ambiguity. As currently worded, it appeared to suggest that the forum State was entitled to initiate criminal proceedings and might take coercive measures against officials of a foreign State, irrespective of the outcome of the examination of immunity, because the phrases "before initiating" and "before taking" were vague as to the outcome of the examination of immunity. With that vagueness, it could be inferred that while the examination was being conducted, and without prejudice to its outcome, the forum State could continue its action. Greater precision was essential to prevent legal uncertainty in the draft article. It was particularly important to clarify that the obligation set forth in paragraph 2 did not preclude the adoption of any measures necessary to prevent a prejudice in the response to an imminent and unlawful use of force.

33. What appeared to his delegation as vagueness was enshrined unequivocally in draft article 10 (Notification to the State of the official), where the Commission

seemed to no longer consider whether the State official had immunity or not, by simply providing that the forum State should notify the State of the official of any criminal proceedings it intended to initiate or coercive measures it intended to take. At no point did it mention the time of the lifting of immunity. The vague reference to the invocation of immunity in draft article 11 was neither reassuring nor convincing, since it introduced highly subjective wording, at least in the French version of the text, such as "*dans les meilleurs délais*", to reflect the English expression "as soon as possible". The expression "*dans les meilleurs délais*" was the equivalent of "within the shortest time frame", but there was no indication of how that time frame might be determined. His delegation therefore suggested that the expression "*dans les meilleurs délais*" in the French text be replaced with the expression "*dès que possible*".

34. His delegation believed that, while it was clearly important to notify the State of the official of any criminal proceedings or coercive measures, notification alone was insufficient. It was also necessary to maintain consistency with draft article 12 (Waiver of immunity), which provided that the immunity of a State official from foreign criminal jurisdiction might only be waived by the State of the official. His delegation believed that no proceedings could be brought against the official while he or she enjoyed immunity, a position reaffirmed by the International Court of Justice in its judgment in the *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) case. Moreover, the waiver of immunity could not be presumed; it must always be express and in writing, a position reaffirmed by a number of courts, including the French Court of Cassation.

35. His delegation also questioned the provisions of draft article 13 (Requests for information). In its view, the forum State did not simply have the option to request information from the State of the official; it had an absolute obligation to do so in order to ascertain the extent of the official's immunity. His delegation also believed that the responsibility for deciding what to do with the representative's immunity lay with the State of the official, and that States should be trusted to act in good faith in all situations.

36. In draft article 14 (Determination of immunity), the Commission should reconsider the use of the phrase "before initiating criminal proceedings", which was found in paragraph 4 of the draft article and also in paragraph 2 of draft article 9 (Examination of immunity by the forum State), in respect of the time when the question of immunity should be determined. For the sake of legal certainty and to ensure due administration of justice, the question should be resolved before any action of any kind was taken against the State official.

37. The provision in paragraph 1 of draft article 14 that the competent authorities of the forum State should make a determination of immunity according to its law and procedures was strange and worrying. It extended the jurisdiction of a foreign State into a domain over which another State had sovereign rights, and rendered the provisions of draft articles 10, 11, 12, 13 and 16 null and void by giving the final say to the forum State. For his delegation, that provision violated the procedural safeguards set forth in draft article 16 (Fair treatment of the State official) and highlighted the issue of whether the jurisdiction of the authorities of the forum State extended to the State of the official, to the point of the forum State determining who was or was not entitled to immunity. The provision should thus be reformulated.

38. For his delegation, all the measures to be taken into account in making a determination of immunity, set out in paragraphs 2 and 3, were simply an illusion. The fact remained that only the State of the official was competent to determine his or her immunity. His delegation also wondered what the Commission meant when it stipulated that the authorities making the determination of immunity should be at "an appropriately high level". That clearly subjective criterion was strange and questionable; indeed, it could allow foreign courts and tribunals to exercise indirect control over the acts of another State.

39. His delegation urged the Commission to reformulate draft article 15 (Transfer of the criminal proceedings) to establish that, rather than having the option of transferring the criminal proceedings to the State of the official, the forum State had an obligation to do so, and a request for such transfer must be considered in good faith by the forum State, which would have to suspend the proceedings once the State of the official initiated its own proceedings.

40. It was important to underscore that immunity rested with States, which granted it to their officials to allow them to perform their duties as public servants with peace of mind, since States were legal persons that acted through individuals and only they could lift that immunity, according to the procedures established for that purpose. His delegation therefore invited the Commission to conduct a detailed review of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), where, after examining the practice of States before national courts, it had affirmed that immunity was granted to officials not for their personal benefit but to protect the rights and interests of the State.

41. In international law, immunity was the corollary of the principle of the sovereign equality of States, a point reiterated vividly by the Court in the aforementioned judgment when it stated that it "considers that the rule of State immunity […] derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order." According to the maxim *par in parem non habet imperium*, one sovereign power could not exercise jurisdiction over another. The principle of sovereign equality of States on which immunity was predicated must be scrupulously respected in order not to undermine inter-State relations and compromise the ultimate goal of ending impunity for the most serious international crimes – and respect for that principle precluded the initiation of criminal proceedings against officials of foreign States. His delegation disassociated itself from the obvious attempt to gradually restrict that immunity, and called for it to be fully restored.

42. The consultations envisaged in draft article 17 should be genuine, effective and sincere; they should also be conducted systematically, and not simply "as appropriate", as stated in the draft article. On the subject of immunity, solutions should be sought not unilaterally, but by negotiation, as provided in draft article 18 (Settlement of disputes), with an open mind and based on mutual respect. However, the dispute settlement procedure should be initiated only once a definitive determination of immunity had been made by the competent judicial authorities. Regarding the title of the draft article, "Procedural requirements" would be more appropriate because "settlement of disputes" suggested a binding obligation for States. It was inappropriate to include a dispute settlement clause in the draft articles, given that such clause would limit the exercise of criminal jurisdiction by States. In addition to negotiation, arbitration and judicial settlement, the other means of peaceful settlement of disputes set forth in Article 33 of the Charter should be mentioned, to better align the provision with the practice of States.

43. It was also important to highlight the obligation of all States under Article 2, paragraph 3, and Article 33 of the Charter to settle any differences between them by peaceful means, as well as the importance of the freedom of States to choose the means of dispute resolution. His delegation supported the suggestion that an additional paragraph making express reference to the principle could be incorporated in the draft article. In any event, the focus should be on the freedom of choice of means that States had, rather than on the violation of that freedom. His delegation also welcomed the addition of the phrase "other peaceful means of their own choice" after the word "negotiations" at the end of paragraph 1 of draft article 18.

44. Lastly, his delegation was concerned about the adoption of draft articles on the current topic that would be seemingly geared towards establishing a new international law, would undermine, attack and dismantle the foundations of international law, and would violate Article 2, paragraphs 1 and 2, of the Charter and all resolutions related thereto. To give certain courts and tribunals precedence over national courts would be contrary to the principle of complementarity.

45. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation supported the Commission's decision to request the Secretariat to prepare a memorandum identifying elements of the Commission's previous work that could be relevant for its future work, in particular in relation to statehood and the protection of persons affected by sea-level rise. The rise in sea levels, which was an inevitable consequence of climate change, was accelerating, bringing often dramatic repercussions for the most vulnerable coastal areas and their populations.

46. Beyond its already considerable human, economic and environmental impact, the phenomenon raised a number of legal challenges that justified the Commission's decision to address the issue. Those challenges included the impact of sea-level rise on the boundaries of coastal States' maritime spaces and the lacunae and uncertainties present in positive law and, in particular, the United Nations Convention on the Law of the Sea, which was silent on the matter. Thus, it was right that the work of the Study Group on sea-level rise in relation to international law should encompass considerations that potentially extended beyond the traditional dichotomy between codification and progressive development of international law. In view of the complexity of the issues, improvements to the Commission's methods of work might also be required.

47. The complex and unprecedented situations brought about by sea-level rise called for urgent action. The prolonged or possibly permanent loss of territory that some States were facing would almost inevitably affect their practical ability to exercise their rights and fulfil their obligations under international law. In that context, an examination of the practical options available to vulnerable States whose existence was threatened by sea-level rise would be useful. All contingencies should be considered with a view to identifying sustainable and effective measures to address concerns that were central to the survival of

many States. His delegation agreed that there should be no limits in that regard, in order to allow the Study Group to reach a conclusion as to whether existing international law was adequate to address the difficulties encountered or whether new rules and principles were needed to fill any possible gaps. His delegation therefore believed that the Commission should deepen its work of reviewing or outlining the relevant legal problems arising from situations of sea-level rise.

48. With regard to the Commission's methods of work, his delegation supported the idea that the Commission could, in the next quinquennium, turn the topic into a traditional topic. It would continue to follow the Commission's work with the aim of maintaining the legal stability, security, certainty and predictability of maritime zones threatened by sea-level rise.

49. *Mr. Leal Matta (Guatemala), Vice-Chair, took the Chair.*

50. **Mr. Muhith** (Bangladesh), addressing the topic "Sea-level rise in relation to international law", said that his country had recently recovered from a devastating cyclone attributable mainly to the adverse effects of climate-induced sea-level rise. Despite facing tremendous challenges, his Government had successfully evacuated those in danger and had been able to ensure timely and sufficient supplies of food, clothes, drinking water and medicine. The disaster had confirmed once again that sea-level rise was one of the most pressing issues of the times. However, while the political and socioeconomic consequences of the phenomenon were a frequent subject of analysis, the legal implications had yet to be fully and adequately researched. On the issue of statehood, the determination of the legal status of a State whose land territory had been completely covered by the sea was a question that, in the absence of any existing legal framework, required intensive analysis.

51. On the question of protection of persons affected by sea-level rise, the second issues paper prepared by the Study Group on sea-level rise in relation to international law (A/CN.4/752 and A/CN.4/752/Add.1) was of critical importance for Bangladesh, as a low-lying coastal country. It provided examples of State practice in the event of disasters induced by sea-level rise, and his delegation was pleased to see that the paper contained a reference to his country's good practices. The United Nations Convention on the Law of the Sea remained the foundational instrument for ocean governance and all the Commission's opinions and observations regarding the interrelation between sea-level rise and international law must be in line with the fundamental principles set out therein.

52. **Ms. Ali** (Maldives), referring to the topic "Sea-level rise in relation to international law", said that, as a nation particularly vulnerable to rising sea levels, Maldives had long supported international action on the issue. In 1989, it had hosted the first Small States Conference on Sea Level Rise, bringing together 14 small island States to sign the Malé Declaration on Global Warming and Sea Level Rise. The Conference had led to the establishment of the Alliance of Small Island States.

53. For low-lying and small island developing States, sea-level rise was an existential threat and, for Maldives in particular, climate scientists had already forecast the unthinkable: the country's territory would be uninhabitable by the end of the twenty-first century. Its people would lose their culture, traditions, homes and livelihoods and would be essentially rendered stateless. The international community must therefore consider the perspective of countries like Maldives when creating and formulating policies and must accord the situation the gravity and urgency that it demanded.

54. Focussing on the protection of persons affected by sea-level rise, she noted that the Study Group on sea-level rise in relation to international law had indicated that the framework provided by the Commission's draft articles on the protection of persons in the event of disasters might be further developed to address the specific needs of persons affected by sea-level rise. It was important to highlight, however, that climate change was a human-made disaster, not a natural one. While those draft articles might offer useful guidance, they would need to be supplemented by an analysis of transboundary harm and international accountability that was guided by the principle of common but differentiated responsibilities. A human-rights-based approach was also essential to advancing debate on the topic, as the unforgiving effects of climate change had a disproportionally severe impact on the most vulnerable sections of the population: women, children, older persons, people with disabilities, people of colour and indigenous groups. Given the variety of international law instruments relating to vulnerable populations, an intersectional perspective should be incorporated into the debate.

55. Despite the distressing forecasts, her country was striving to maintain its land, its culture and its history. Preserving their statehood and protecting their people was a matter of survival that had important legal implications for all low-lying and small island developing States. Thus, in the continuing debate, the

emphasis should be placed on wider perspectives and increased solidarity and empathy.

56. **Ms. Dao** Thi Ha Trang (Viet Nam), addressing the topic "Immunity of State officials from criminal foreign jurisdiction", said that, since immunity from foreign criminal jurisdiction for State officials had its origins in customary international law, the codification of the rules governing it must be approached with care, and with due regard for the principles of sovereign equality and non-intervention in the domestic affairs of States, as well as the need to maintain international peace and security. A balance between the benefits of granting immunity, the need to address impunity and the need to protect State officials from the abusive or politically motivated exercise of criminal jurisdiction was essential.

57. With regard to the topic "Sea-level rise in relation to international law", she noted that Viet Nam was among the countries most vulnerable to the adverse impact of climate change in general, and sea-level rise in particular. Its coastlines and low-lying areas, and the livelihoods, health, culture and well-being of those living there, had already been severely affected. Her delegation was thus well aware of the necessity and urgency of the continued codification and development of international rules to address the phenomenon. That process should be guided by the principle of sovereign equality of States and, to ensure stable maritime borders and maintain peace and stability in international relations, all solutions must be based on international law, including the United Nations Convention on the Law of the Sea. The Commission should also consider the principles of international environmental law during its work on the topic.

58. **Ms. Motsepe** (South Africa), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that States needed to strike a balance between the need to protect the well-established norm of immunity of their officials from foreign criminal jurisdiction and the prevention of impunity for serious crimes. They should always be mindful of their responsibility to prevent the political abuse of the immunity afforded to their officials, since the intention of immunity was never to allow for the avoidance of responsibility and the exacerbation of criminal behaviour, but to afford State officials an opportunity to perform their duties without interruption.

59. With regard to the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, South Africa was pleased with the inclusion of safeguard provisions against abuse, inconsistencies and unfairness in the application of immunity of State officials from foreign criminal jurisdiction. It welcomed the fact that, as stated in paragraph 3 of draft article 1, the draft articles did not affect the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements.

60. Her delegation supported paragraph 1 of draft article 7, in which the crimes under international law in respect of which immunity *ratione materiae* should not apply were clearly spelled out, as well as paragraph 5 of draft article 14, where the Commission pointed out that any determination that an official of another State did not enjoy immunity should be open to challenge through judicial proceedings, and that that provision was without prejudice to other challenges to any determination about immunity that might be brought under the applicable law of the forum State.

61. Turning to the topic "Sea-level rise in relation to international law", she said that her delegation shared the view that sea-level rise as an effect of climate change was a global phenomenon which would directly and indirectly affect the international community as a whole. Africa in particular was facing its own challenges with sea-level rise and erosion, which were threatening to alter its shorelines and destroy its important heritage monuments, some of which were yet to be discovered.

62. Although it acknowledged the impact that a partial submersion or total physical disappearance of the territory of a State due to sea-level rise could have on the criteria or requirements for statehood, her delegation shared the view that a State could remain a subject of international law and retain its sovereignty despite the loss to its territory and the forceful displacement of its population to the territory of another State. It supported that presumption of continuity of statehood because there was no requirement under international law that the seat of the Government of a State be located within the territory of that State or within any particular territory. That presumption, nonetheless, also had limitations, including the uncertainty as to whether an affected Government that had been relocated to another State and that had limited or no resources would be able to continue to exercise effective control over its territory and maritime zones independently of the receiving State or other entities.

63. South Africa welcomed the alternative measures suggested by the Commission, States and international organizations for an affected State in the event of partial or total submersion of its territory, including the construction of artificial islands and the possibility of leasing territories from other States. It also recognized

the potential threat to human rights enjoyed by a population or a community of people who might have migrated to a territory of another State as a consequence of sea-level rise. It appreciated the contributions made by States, in particular low-lying and small island developing States, and international organizations and relevant entities toward promoting measures to assist States in dealing with issues concerning the protection of human rights during climate displacement. Her Government would continue to support and pledge its participation in the respective discussions on the development of an international legal framework or a possible convention regulating the protection of persons affected by rising sea levels.

64. **Ms. Gerstein** (United Kingdom), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that her delegation looked forward to considering in detail the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading and encouraged the Commission to consider carefully all the views of States, whether expressed orally in the Committee or submitted in writing, and to ensure that those views were fully taken into account as work proceeded on the topic in 2023.

65. The United Kingdom welcomed the Commission's clarification of the scope of the draft articles in draft article 1, including of the relationship between the draft articles and specific international agreements and other special rules of international law. It commended the Commission for the procedural provisions set out in Part Four, which could have significant practical implications for national authorities. The Commission should ensure that any final version of the draft articles could be applied across diverse national legal systems.

66. Her delegation wished to recall that the status of the exceptions to immunity proposed in draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) remained contested both within the Commission and even more so among States, and that – exceptionally – the provision had only been adopted by a vote of the Commission in 2017. It was vital for the Commission to clearly indicate the draft articles which it considered to reflect existing international law and those which did not. If the Commission's work on the topic was going to contain proposals for the progressive development of the law or new law, the appropriate form for the outcome should be draft articles which could form the basis for a negotiated convention.

67. Turning to the topic "Sea-level rise in relation to international law", she said that her delegation was carefully examining the work of the Study Group on sea-level rise in relation to international law concerning statehood and the protection of persons affected by sea-level rise, and looked forward to considering the results of the Study Group's further deliberations on issues related to the law of the sea.

68. **Ms. Melikbekyan** (Russian Federation), referring to the topic "Immunity of State officials from foreign criminal jurisdiction" and the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, said that her delegation took note of paragraph (3) of the commentary to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), in which some members of the Commission had recalled their vote against the draft article in 2017 and their reasons as detailed in their explanations of vote, and had asserted that the fact that no vote had been taken in 2022 did not mean that either the law or their legal positions had changed in any way. Her delegation agreed with those members of the Commission who took the view, as stated in paragraph (12) of the commentary to the draft article, that in proposing the draft article the Commission was conducting a "normative policy exercise" that "bore no relation to either the codification or the progressive development of international law", and shared their position as set out in the points lettered (a), (b), (c) (ii) and (iii), (d) and (e) of that paragraph.

69. Given that international criminal jurisdiction was outside the scope of the draft articles, her delegation did not believe that draft article 1 (Scope of the present draft articles), paragraph 3, which contained the clause referring to international criminal courts and tribunals, was necessary. Her delegation also disagreed with the suggestion contained in paragraph (25) of the commentary to draft article 14 (Determination of immunity) that proceedings in respect of the crimes under international law listed in draft article 7 could be instituted by a plurality of jurisdictions, both national and international. It also noted that paragraph (25) contained no reference to the principle of *non bis in idem*, which would help to clarify draft article 15 (Transfer of the criminal proceedings), which provided that the forum State might resume criminal proceedings if, after the transfer of the proceedings to the State of the official under an international agreement, the State of the official did not "promptly and in good faith submit the case to its competent authorities for the purpose of prosecution." It was unclear how or by whom it could be determined whether the State of the official had fulfilled its duty and whether it had done so in good faith. Furthermore, it was unclear what the

consequences of a decision by the forum State to resume criminal proceedings might be, given that doing so would result in multiple criminal proceedings being brought in respect of the same crime.

70. The Commission should also examine whether the status of State officials was affected if they were nationals of the State in which they held their office, and at the very least reflect its conclusion on that point in the commentary to draft article 2, subparagraph (a), which contained a definition of the concept of "State official". In paragraph (2) of the commentary to draft article 3 (Persons enjoying immunity *ratione personae*) and also in the commentary to draft article 16 (Fair treatment of the State official), the Commission had appeared to conclude that nationality was not relevant for determining the official's status. However, a reader had to draw that conclusion based on a number of disparate commentaries that were not supported by practice.

71. It remained unclear whether *ultra vires* acts could be considered official acts for the purposes of immunity from foreign criminal jurisdiction. In the version of the draft articles and the commentaries thereto adopted on first reading and published in the Commission's report (A/77/10), the term "*ultra vires*" appeared only two times, one of which was in footnote 935 of the report, along with a selection of United States court decisions in which the reasons for the exclusion of *ultra vires* acts from the scope of immunity were supposedly explained clearly, but those decisions could hardly be considered representative. Indeed, the former Special Rapporteur, Mr. Kolodkin, had reached the conclusion, presented in his second and third reports (A/CN.4/631 and A/CN.4/646), that immunity *ratione materiae* did extend to *ultra vires* acts of State officials. The Commission should revisit that point during the second reading.

72. There was no need to include a definition of the term "exercise of criminal jurisdiction" in the draft articles or commentaries, as found in paragraph (7) of the commentary to draft article 8 (Application of Part Four) and paragraph (5) of the commentary to draft article 9 (Examination of immunity by the forum State). Besides, there was some inconsistency between those definitions. The commentary to draft article 9 also contained a contradiction. In paragraph (10) of the commentary, it was noted that initiation of criminal proceedings referred to "the commencement of judicial proceedings brought for the purpose of determining the possible criminal responsibility of an individual, in this case an official of another State". Meanwhile, paragraph (6) of the commentary contained a reference to the practice of the International Court of Justice and read: "the commencement of a preliminary investigation or institution of criminal proceedings, not only in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity if it does not impose any obligation upon that person under the national law being applied."

73. Draft article 12 (Waiver of immunity), paragraph 5, in which it was stated that a waiver of immunity was irrevocable, reflected a general rule that manifested the principle of good faith and addressed the need to respect legal certainty. The list in footnote 1092 of the Commission's report, which showed countries having laws on immunity that addressed the question of waiver of immunity, could have included the Russian Federation and its Act No. 297-FZ of 3 November 2015, on the legal immunities of a foreign State and the property of a foreign State in the Russian Federation, article 6 of which provided that a foreign State's waiver of immunity from prosecution in respect of a specific dispute was irrevocable and applied to all stages of the proceedings. The Commission should take up that point during its discussion of the commentary to draft article 12 on second reading.

74. Paragraph (34) of the commentary to draft article 14 (Determination of immunity) included questionable examples of coercive measures that could be taken against a foreign official under paragraph 4 (b) of the draft article, including measures aimed at preventing the official's departure from the territory of the forum State. Such measures would indeed "affect" the official, considering in particular that it followed from paragraph (30) of the commentary to the draft article that the presence of the official in the territory of the forum State was not considered a requirement for the exercise of criminal jurisdiction over that official. The requirement that the official surrender his or her passport was also excessive.

75. The most appropriate form for the Commission's output on the topic was that of draft guidelines, which would serve as a *vade mecum* or toolbox which the authorities of the forum State and the State of the official could use to find answers to practical questions that arose in connection with measures taken as part of the exercise of criminal jurisdiction that could affect the foreign official. Consequently, it would be appropriate to exclude draft article 18 (Settlement of disputes) from the draft articles altogether, as such provisions were typically included in treaties. Rather than rush to complete the second reading of the draft articles, the Commission should carefully study the comments of States and reflect them in the draft text. The timeframe for the Commission's consideration of the topic could be extended if needed.

76. Turning to the topic “Sea-level rise in relation to international law” and the second issues paper prepared by the Study Group on sea-level rise in relation to international law, she said that sea-level rise was a global phenomenon that affected all States in a variety of ways, including in the form of partial or complete inundation of territory, which raised questions in relation to statehood. Her delegation agreed with the Commission that each of the criteria for the creation of a State, as set out in the Convention on the Rights and Duties of States, was multifaceted. It also agreed that the applicability of the sources of international law examined and the relevance of existing practice was yet to be determined. Issues related to the law of the sea would also need to be taken into consideration. The possible alternatives for the future concerning statehood, illustrative examples and practical difficulties proposed by the authors of the issues paper would indeed be helpful. Her delegation did not rule out the possibility of creating *sui generis* legal regimes.

77. Measures aimed at mitigating the effects of sea-level rise, such as coastal reinforcement measures, were especially important and could be adopted through international cooperation. The environmental impact of coastal reinforcement measures and the construction of artificial islands needed to be assessed from the perspective of small island developing States.

78. With respect to the subtopic of the protection of persons affected by sea-level rise, her delegation believed that, in its future work, the Commission should take into consideration the degree and long-term nature of the effects of sea-level rise, which distinguished them from the effects of natural disasters. Considering that the international legal frameworks that were potentially applicable were few in number and fragmented, her delegation agreed with the Co-Chair of the Study Group that it was necessary to assess the relevance of the Commission’s prior work. The status of such persons, their rights and their protection both in situ and in displacement should also be studied as well as the responsibilities of States and their scope under international law. The status of persons was closely tied with questions of statehood. In the case of persons displaced by sea-level rise, it would be worthwhile to examine the different aspects of statelessness and the status of such persons if they did not meet the criteria for refugee status.

79. Her delegation supported the Commission’s continued work on the topic.

80. **Ms. Cáceres Navarrete** (Chile), addressing the topic “Immunity of State officials from foreign criminal jurisdiction”, said that according to the definition of the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, set out in draft article 1, the draft articles applied to the immunity of State officials from the criminal jurisdiction of foreign courts specifically. That meant that criminal responsibility for an official’s conduct could be established in other judicial bodies, such as international tribunals, particularly the International Criminal Court, and the courts of the State of the official involved.

81. Limitations to immunity *ratione personae* were appropriately set out in draft article 4, which provided that such immunity could be invoked during the term of office of any of the officials covered by the draft article, and that the immunity covered all acts performed, whether in a private or official capacity, during or prior to their term of office. After their term of office had ended, the officials could invoke their immunity in the courts of other States only for official acts performed during that period. Consequently, they did not enjoy immunity *ratione materiae* for any private acts performed during that period. Such immunity could also not be invoked in respect of the crimes referred to in draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), since such acts could not be considered official acts. Indeed, the question of limitations and exceptions to immunity from foreign criminal jurisdiction was highly complex, bringing into play fundamental principles of international law, such as the sovereign equality of States, on the one hand, and the fight against impunity for serious international crimes, on the other.

82. With respect to Part Four (Procedural provisions and safeguards) and the obligation of the competent authorities of the forum State to “examine” the question of immunity as soon as they became aware that an official of another State might be affected by the exercise of its criminal jurisdiction, her delegation found that the expression “examine the question of immunity” did not make clear the scope of that obligation. Similarly, the definition of “examination of immunity” in paragraph (1) of the commentary to draft article 9 as “measures necessary to assess whether or not an act of the authorities of the forum State involving the exercise of its criminal jurisdiction may affect the immunity from criminal jurisdiction of an official of another State” did not indicate the minimum obligations that the competent authorities would need to fulfil when “examining” immunity. Her delegation considered the expression “criminal proceedings”, used in paragraph 2 (a) of draft article 9, to be too limiting; it would be more appropriate to expand the reference to any act involving the exercise of criminal jurisdiction by the forum State,

as indicated by the title of the draft article and a series of other draft articles.

83. The determination of immunity, understood as the decision on whether or not immunity applied in a particular case, was one of the fundamental procedural safeguards applicable to a State official in relation to the criminal jurisdiction of the forum State. "Determination" was the final stage of a process in which the competent authorities of the forum State made an assessment of the various elements and circumstances of a particular case. It was to be distinguished from the "examination" of immunity covered in draft article 9, which referred only to the initial consideration of the question. Her delegation shared the Commission's view, as expressed in its report, that a determination about immunity must be made whenever the question of immunity from the forum State's exercise of criminal jurisdiction arose, including in cases where draft article 7 might be applicable.

84. Her delegation agreed with the reference in paragraph 1 of draft article 14 that the determination was to be made "in conformity with the applicable rules of international law", since it complemented the fact that the determination of immunity was to be made in accordance with the national law of the forum State. The reference also constituted a safeguard for the State official and for the proceedings themselves, given that both customary and treaty rules that might have a bearing on immunity and its determination were fully applicable.

85. With regard to paragraph 2 of draft article 18 (Settlement of disputes), while the phrase "a reasonable time" was used frequently in international conventions, it did not provide legal certainty and tended to cause unnecessary delay in immunity proceedings and unnecessary discrepancies in the qualification of the reasonableness of a given time period. It would therefore be appropriate to refer to a specific time period, however short, that would allow the best efforts to be made to reach a mutually accepted solution before a dispute was submitted to a binding forum.

86. Turning to the topic "Sea-level rise in relation to international law", she said that the discussion around the protection of persons affected by sea-level rise was not just timely but urgent, because, as the Study Group on sea-level rise in relation to international law indicated in paragraph 73 of its second issues paper (A/CN.4/752), and as many delegations had noted in the Committee, the effects of sea-level rise would not be felt uniformly across the international community, but would depend on the geographic, climatic, socioeconomic and infrastructural conditions of each State. Those effects were not felt in proportion to the contribution of countries and communities that were most vulnerable to climate change, such as small island developing States.

87. While the most serious consequences of sea-level rise, such as the total inundation and uninhabitability of certain States, would not be felt over the next few years, some of those consequences had already started to be felt in some communities that had been displaced from their localities, or that lived in constant fear of seeing their way of life threatened. It would therefore be highly useful, in the next phase of its work, for the Study Group to deepen its analysis of legal mechanisms and frameworks potentially applicable to the protection of persons affected by sea-level rise, focusing especially on the preventive and mitigation measures available in international law and the existing mechanisms to combat climate change.

88. On the subtopic of statehood, Chile welcomed the Co-Chairs' analysis of existing examples that would support the presumption of continuing statehood. However, for its future work, the Study Group should examine the conditions and practical implications of such presumption in more detail. Indeed, most of the examples given in the issues paper referred to situations that were temporary in nature, such as the cases of Governments in exile. That was different from the situation of States that were completely submerged or uninhabitable owing to sea-level rise, which was rather irreversible. It was therefore necessary to determine whether said presumption could be maintained indefinitely and under what conditions. It would also be important to consider more deeply the manner in which said States might continue to fulfil their rights and obligations towards their nationals, in particular to guarantee the protection of their human rights. The consequences of the potential extinction of a State, in particular with regard to issues such as the statelessness of its population, the exercise of its right to self-determination, and the responsibility of the international community for its protection, should also be explored, especially considering that the Commission had recognized the right to self-determination as a peremptory norm of general international law (*jus cogens*) and the International Court of Justice had also asserted its *erga omnes* character.

89. With regard to the subtopic of protection of persons affected by sea-level rise, Chile agreed that sea-level rise posed a significant threat to small islands and low-lying coastal areas around the world, especially considering that it could seriously affect people's lives. Chile therefore welcomed the Co-Chairs' analysis of

existing legal frameworks potentially applicable to their protection. It agreed with the indication in paragraph 234 of the issues paper that there was no specific legal framework that regulated the protection of persons who were affected or displaced owing to the adverse effects of climate change, such as sea-level rise. However, and without prejudice to the future negotiation of a specific instrument dealing with that situation, it was the view of her delegation that the international legal order had general norms that could be used to protect persons affected by the phenomenon, in particular international human rights law.

90. As acknowledged in paragraph 252 of the issues paper, sea-level rise threatened all aspects of human life, including the right to life and its related rights, such as the right to water, food and health. However, rising sea levels also affected the enjoyment of the human right to a clean, healthy and sustainable environment, as recognized by the Human Rights Council and the General Assembly. Chile therefore agreed with the assertion in paragraph 239 of the issues paper that any response to the phenomenon of sea-level rise must take place with full respect for the rights of affected persons. The special vulnerability of groups such as women, children and adolescents, the elderly and Indigenous Peoples must be taken into consideration. An important development to consider in that connection was the recent decision of the Human Rights Committee to hold Australia responsible for failure to protect the Indigenous Peoples of the Torres Strait region against the impacts of climate change.

91. Some of the effects of sea-level rise were felt more significantly by communities and States that only made a minimal contribution to climate change. While recognizing that territorial States had the duty and responsibility to provide protection and assistance to persons within their jurisdiction, it would be important for the Study Group to also be able to examine the responsibility that other States might have on the issue, in the light of the principle of common but differentiated responsibilities, the "polluter pays" principle and other principles that might be relevant. The valuable case law of the Inter-American Court of Human Rights and other international developments might be of some assistance to the Study Group in determining the legal framework applicable to the protection of persons affected by sea-level rise.

92. Lastly, it would be advantageous for the Study Group to be able to provide more details about the circumstances in which derogation from human rights obligations was permitted, as stated in paragraph 253 of the issues paper. Her delegation agreed that it would be of great value for the Study Group to continue examining in detail the questions set out in paragraph 435 of the issues paper, in particular what the obligations of non-refoulement for third States in respect of persons affected by sea-level rise would be, and to what extent the principle of international cooperation by other States applied or should be applied to help States in protecting persons affected by sea-level rise.

93. *Ms. Romanska (Bulgaria), Vice-Chair, took the Chair.*

94. **Ms. Hanlumyuang** (Thailand), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that in determining and applying immunity, it was necessary to strike the right balance between affording immunity from foreign criminal jurisdiction to State officials and ending impunity, while underlining and taking into account respect for the principle of sovereign equality of States. Her delegation took note of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading and also recognized the importance of the inclusion of procedural safeguards in Part Four thereof, which were crucial to protecting the rights and interests of States while ensuring transparency and due process of law.

95. Turning to the topic "Sea-level rise in relation to international law", she said that her delegation welcomed the completion by the Study Group on sea-level rise in relation to international law of its second issues paper (A/CN.4/752), concerning statehood and the protection of persons affected by sea-level rise. Fully aware of the fragmentation of the existing international legal frameworks potentially applicable to the protection of persons affected by climate change, including sea-level rise, Thailand recognized both the urgency and the utmost importance of the Commission's work on the topic. Through that work, the Commission was charting practical ways forward for the international community to address existing gaps and protect persons affected by the troubling impacts of climate change. Her delegation strongly urged the Study Group to continue its work and looked forward to further reports on the topic.

96. Thailand noted that the Study Group would revert to the subtopic of the law of the sea in 2023. In that connection, it wished to reiterate that the rights of States in relation to maritime zones and boundaries, as guaranteed by the United Nations Convention on the Law of the Sea, must be protected. Maritime boundaries already established by treaties or adjudication should be final and not affected by sea-level rise. It was critically important that the work on the topic be completed on the

basis of sufficient State practice, and that the voices and concerns of all States, regardless of their size or level of development be reflected accordingly.

97. **Mr. Abdelaziz** (Egypt), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that Egypt was fully committed to accountability for all crimes, regardless of the function of the defendant. However, his delegation continued to have the concerns that it had shared at previous sessions and, in particular, the fact that the topic should be addressed cautiously, in such a way as to reflect *lex lata* and customary international law, without introducing new legal rules.

98. His delegation maintained its strong reservations regarding draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading. As many other delegations had pointed out, the provisions of the draft article were not compatible with customary international law. While welcoming the developments in Part Four of the draft articles (Procedural provisions and safeguards), his delegation continued to believe that it would be useful to distinguish between procedural guarantees connected with immunity *ratione personae* and those connected with immunity *ratione materiae*, which belonged to distinct categories.

99. With regard to draft article 14 (Invocation of immunity), his delegation welcomed the provision contained in paragraph 4 (b) to the effect that the competent authorities of the forum State should always determine immunity before taking measures against the official. However, it was then stated that the paragraph did not prevent the adoption or continuance of measures that would make it possible to initiate subsequent criminal proceedings. While appreciating the reasons for that provision given in paragraph (34) of the commentary to the draft article, his delegation believed that such measures should be as limited as possible, and that a time limit should be stipulated for examining the question of immunity. His delegation remained convinced that immunity should be assumed not to have been waived, and that a clear procedure should be in place for waiving immunity.

100. As its consideration of the topic entered its final phase, the Commission should exercise caution; given the current international situation, non-consensual legal interpretations would merely increase the tension in inter-State relations and undermine stable international principles and norms. His delegation therefore urged the Commission to give due weight to the concerns raised by Member States.

101. Referring to the topic "Sea level rise in relation to international law", he said that the Commission had an important part to play in responding to the effects of climate change. In the light of the twenty-seventh Conference of the Parties to the United Nations Framework Convention on Climate Change, to be held in Sharm el-Sheikh, Egypt in November 2022, it was essential to take swift and decisive action and to ensure that developed countries fulfilled their commitment to double their funding for climate adaptation projects by 2025. His delegation supported the Secretary-General's recommendation that 50 per cent of climate finance should be spent on adaptation.

102. **Mr. Ripol Carulla** (Spain), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that draft article 1 of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading was highly important. It set out the scope of the draft articles, showing that the persons enjoying immunity were State officials; that the jurisdiction affected by immunity was criminal jurisdiction; and that the criminal jurisdiction affected was that of third States. The Commission acknowledged that the draft articles did not apply to the immunity from criminal jurisdiction enjoyed under special rules of international law by persons connected with the diplomatic missions, consular posts, special missions, international organizations and military forces of a State, or to rights and obligations under international agreements establishing international criminal courts and tribunals.

103. Since the draft articles dealt with the immunity of State officials, they went beyond the traditional focus of the immunities of Heads of State, Heads of Government and Ministers for Foreign Affairs, at least as established in the case law of the International Court of Justice and in the work of the Institute of International Law. According to the draft articles, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed immunity *ratione personae* only during their term of office, for all acts they performed, whether in a private or official capacity, during or prior to their term of office. By contrast, State officials enjoyed immunity *ratione materiae* only with respect to acts performed in an official capacity, which meant that their immunity did not extend to acts performed in a private capacity or acts performed before their term of office. Spain agreed with that distinction, which was undoubtedly consistent with international norms and practice.

104. Spain agreed with the content of draft article 7, concerning crimes under international law in respect of which immunity *ratione materiae* should not apply, and with the reasons provided by the Commission in its commentary for the inclusion of those crimes. It also welcomed the procedural rules set out in Part Four, which might help to resolve some highly relevant issues raised by the practical application of the rule of immunity, such as the need to maintain a balance between the right of the State of the official to immunity, on the one hand, and the right of the forum State to exercise its jurisdiction, on the other, and the need to avoid the risk that the exercise of immunity might pose to the stability of inter-State relations.

105. Turning to the topic "Sea-level rise in relation to international law", he said that contrary to the suggestion made by the Commission in its report (A/77/10), it would be complicated to reduce or eliminate some of the issues addressed by the Study Group on sea-level rise in relation to international law, although they needed to be prioritized, with the focus being on their legal aspects. Although sea-level was a crucial issue for all States, it posed a serious immediate threat to small island developing States in particular. Accordingly, the most pressing issues to be addressed, which should be at the centre of the study on the topic, should be those relating to statehood and the protection of persons affected by sea-level rise.

106. **Mr. Welles** (Federated States of Micronesia), referring to the topic "Sea-level rise in relation to international law", said that his delegation wished to underscore the finding in the second issues paper of the Study Group on sea-level rise in relation to international law (A/CN.4/752) that "with regard to small island developing States whose territory could be covered by the sea or become uninhabitable owing to exceptional circumstances outside their will or control, a strong presumption in favour of continuing statehood should be considered." It also wished to draw attention to the notation that "such States have the right to provide for their preservation, and international cooperation will be of particular importance in that regard", and that "the preservation of statehood is also linked to the preservation of the rights of States affected by the phenomenon of sea-level rise in respect of the maritime areas under their jurisdiction and the living and non-living resources therein."

107. As a small island developing State that was particularly vulnerable to and specially affected by sea-level rise and other adverse effects of climate change, Micronesia could not accept any interpretation of international law that deprived it of its statehood and the rights and entitlements flowing therefrom simply because it lost land territory due to the actions and omissions of others, particularly those of developed countries and other major greenhouse gas emitters. The criteria for statehood set out in the Montevideo Convention on the Rights and Duties of States could only be accepted for determining whether a State had been created and did not automatically apply when determining whether statehood persisted once that State had been created. Under international law, the extinguishing of statehood should be particularly difficult, especially for those States whose claims to statehood were undermined by acts or omissions of other States beyond the control of the affected States.

108. In the second issues paper, the Co-Chairs of the Study Group had listed a number of possible alternatives for allowing a State to maintain some form of international legal personality without a territory, including association with one or more other States. That alternative seemed to be modelled, at least in part, on the three compacts of free association that the Republic of Palau, the Republic of the Marshall Islands, and Micronesia had entered into with the United States. Those compacts had been entered into between sovereign and independent States and provided for all the parties to retain their statehood without diminution during the terms of the compacts. The compacts also did not and would never represent the diminution or extinguishing of any element of the international legal personality of statehood of any of the parties thereto.

109. While there was a wide range of disciplines of international law that addressed or otherwise had some substantive connection to the protection of persons affected by sea-level rise, there was no single international legally binding instrument or dedicated intergovernmental process pertaining to the matter. His delegation took note of the suggestion referred to in the issues paper for the adoption of a new international legally binding instrument on the matter and was open to discussing it further, particularly after the Study Group completed its work. In that work, the Study Group must take fully into account the acknowledgement by the General Assembly of the right to a clean, healthy and sustainable environment, as well as the findings of the International Court of Justice in a possible future advisory opinion on the legal obligations and consequences associated with the adverse effects of climate change.

110. His delegation welcomed the Study Group's plan to revert to the subtopic of the law of the sea in 2023, in the light of recent developments in connection with the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise issued by the leaders of the Pacific Islands Forum in 2021, including

the fact that a large number of States from multiple regions of the world had welcomed the Declaration. It was important to recall that the Pacific Islands Forum membership's understanding of the application of existing international law of the sea was set out in that Declaration.

111. In a statement delivered earlier, the representative of one delegation had implied that the Declaration amounted to the formation or announcement of the development of new regional customary international law. That representative had failed to understand that the Declaration was not formally meant to establish or announce a new regional customary international law. The representative had also indicated that no such new regional customary international law could develop if it contradicted the views of States from outside the relevant region. For Micronesia, even assuming that the Declaration represented the formation or announcement of a new regional customary international law, the views of States from outside the Pacific Islands Forum region had no bearing on whether such new law could be developed for the region. Indeed, the Commission itself had indicated in its draft conclusions on identification of customary international law that such regional customary international law applied only to those States that accepted it and would not be opposable to States outside the region that did not accept or apply such regional customary international law. His delegation trusted that the Commission and its Study Group would keep that in mind going forward.

112. **Mr. Zukal** (Czechia), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that his delegation would limit itself to brief general comments on certain aspects of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, as it intended to subsequently provide written comments on the draft articles proper.

113. The definition and scope of the immunity of State officials *ratione personae* and *ratione materiae* presented in the draft articles generally reflected current customary international law. His delegation welcomed the adoption of draft article 7, which provided for exceptions to immunity *ratione materiae* and, in principle, properly reflected existing norms of international law and practice, in that immunity *ratione materiae* was not applicable when crimes under international law, as well as so-called official crimes defined in relevant treaties, were committed. The non-applicability of immunity *ratione materiae* seemed to be a consequence of the normative incompatibility of such immunity with definitions and obligations under international law and relevant international conventions, some of which were listed in the annex to the draft articles.

114. His delegation had doubts about the concept and content of Part Four (Procedural provisions and safeguards), since immunity *ratione materiae* applied only when acts of a foreign official performed in his or her official capacity became the subject matter of proceedings before foreign courts. Thus, it was likely that, in the vast majority of cases, foreign State officials enjoying immunity *ratione materiae* would be fully subject to the criminal jurisdiction of foreign States without any immunity being applicable, a fact that did not seem to have been taken into account in the draft procedural provisions. The Commission should also give further consideration to the invocation by a State of the immunity *ratione materiae* of its officials, which would mean that the State would assume possible civil liability under foreign national laws as well as international responsibility for any wrongful acts committed as a result of the official's conduct. It would be useful if the Commission could clarify the interrelation between those concepts.

115. In general, the work on the procedural aspects of the immunity of State officials from foreign criminal jurisdiction should be more focused on the relevant practice of States, namely their laws on criminal procedure and decisions of national courts, on treaties regulating international judicial cooperation and mutual legal assistance in criminal matters, and relevant case law of international courts. The Commission could more broadly analyse common elements in the practice of States and possibly identify non-binding good practices based on the application of existing rules of international law. His delegation did not expect the Commission to formulate additional procedural obligations and held the view that the treaty form would not be an appropriate outcome of the work on the current topic.

116. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation shared the view expressed by a Co-Chair of the Study Group on sea-level rise in relation to international law, as set out in the Commission's report (A/77/10), that "for low-lying and small island developing States, the threat [posed by sea-level rise] is existential in nature, and in the case of small island developing States, it concerns their very survival." The response to that threat must be comprehensive and must include a consideration of aspects relating to international law, although the various elements of the threat carried different weights and were of different levels of urgency. In that respect, it was doubtful whether, in addressing issues relating to statehood, it was necessary to delve into academic

questions such as the notion and criteria for the creation of a State and criteria for statehood, or to draw inappropriate analogies. The questions of existence and continuity or discontinuity of statehood involved a high degree of politically sensitive considerations, where the specific circumstances of individual cases must be taken into account. Any general conclusions concerning those matters might therefore be of limited value for the States concerned. Instead, his delegation would encourage the Commission and its Study Group to embark, as a matter of priority, on the second element, namely the protection of persons affected by sea-level rise.

117. In the light of the progressive character of sea-level rise, the occurrence of natural disasters affecting coastal and small island States would become more frequent and their impact increasingly damaging. The Study Group might therefore wish to consider the question of whether the Commission's prior work, such as the draft articles on the protection of persons in the event of disasters, was adequate to respond to the needs of the people of those States. His delegation agreed with the position of the Co-Chair expressed in paragraph 172 of the Commission's report that "the existing international legal frameworks potentially applicable to the protection of persons affected by sea-level rise were fragmented and general in nature, [and] that they could be further developed to address specific needs of affected persons." That was the main challenge before the Study Group and should be its main task. The guiding questions, spelled out in paragraph 175, which had been proposed in order to structure the future work of the Study Group on sea-level rise in relation to international law, represented a good starting point.

118. **Mr. Chrysostomou** (Cyprus), referring to the topic "Sea-level rise in relation to international law", said that continued ocean and atmospheric warming and rising sea levels posed a grave threat to the lives and livelihoods of populations across the globe and, in particular, those of low-lying coastal States and small island developing States. As an island-State itself, Cyprus had directly felt the grave consequences of climate change and climate-induced sea-level rise.

119. On the scope of the topic, although it appreciated the work of the Study Group on sea-level rise in relation to international law to provide legal clarifications as to the possible effects of rising sea levels, Cyprus maintained its position that the Study Group had no mandate to propose modifications to existing international law, including the customary nature of the United Nations Convention on the Law of the Sea. It was indispensable for the Study Group to fully respect the letter and spirit of the Convention in its work. In that regard, the emphasis placed on the central role of the Convention and the need to preserve its integrity, as mentioned in paragraph 189 of the Commission's report (A/77/10), was welcomed.

120. With regard to the substance of the topic, Cyprus supported the view that, to address the legal effects of coastal erosion, coastal States might designate permanent baselines pursuant to the Convention, which would withstand any subsequent regression of the low-water line. That view was in conformity with the Convention and was aimed at safeguarding the legal entitlements of coastal States in the light of the ongoing, worrisome developments generated by climate change. Cyprus appreciated the work already carried out by the Commission on the Limits of the Continental Shelf, which States were using as a guide in fixing permanent baselines. The Study Group was encouraged to consult the most recent findings by that Commission for its future reports.

121. Moreover, it was the position of his delegation that baselines must be permanent and not ambulatory, in order to ensure greater predictability with regard to maritime boundaries. That position was in line with the Convention, customary international law and international jurisprudence. Fixing baselines at a certain point in time by way of maritime delimitation agreements and the decisions of the International Court of Justice, the International Tribunal for the Law of the Sea and arbitral tribunals established pursuant to the United Nations Convention on the Law of the Sea and other bodies was also consistent with the 1969 Vienna Convention on the Law of Treaties.

122. In that respect, the principle of fundamental change of circumstances (*rebus sic stantibus*), enshrined in article 62, paragraph 1, of the Vienna Convention would have no effect on existing maritime delimitation treaties. Article 62, paragraph 2 (a), of the Convention specifically provided that a fundamental change of circumstances might not be invoked as a ground for terminating or withdrawing from a treaty if "the treaty establishes a boundary." In the view of his delegation, that fundamental rule, intended to ensure the stability of international borders, applied to both land boundaries and maritime boundaries. Thus, rising sea levels should have no legal effect on the status of a concluded maritime treaty. Additionally, boundaries, including maritime boundaries, might continue to exist even if the treaty by virtue of which they were established was no longer in force. Moreover, maritime boundaries designated by international judicial bodies should also remain intact in case of rising sea levels.

123. Cyprus affirmed and reiterated its position that limitations on the application of the principle of *rebus*

sic stantibus seemed also applicable to maritime boundaries in the light of existing case law, which had recognized that there was no need to distinguish between land and maritime boundaries. That view reflected the pertinent international jurisprudence. His delegation had brought that point to the attention of the Commission at the previous session, yet that position was not reflected in the second issues paper of the Study Group on sea-level rise in relation to international law (A/CN.4/752 and A/CN.4/752/Add.1). Cyprus called on the Study Group to include that important and established principle in its work.

124. Cyprus was grateful for the inclusion of its comments on statehood in the Study Group's second issues paper (A/CN.4/752), particularly the observation that "a State was not necessarily extinguished by substantial changes in territory, population or Government, or even, in some cases, by a combination of all three." Cyprus acknowledged the Study Group's focus on the criteria for the creation of a State on existing mechanisms such as the 1933 Montevideo Convention on the Rights and Duties of States, the 1936 resolution of the Institut de Droit International concerning the recognition of new States and new Governments, and the 1949 draft Declaration on Rights and Duties of States. It agreed with the observation in paragraph 198 of the Commission's report that a study on the practice of States regarding the interpretation of the criteria of the Convention on the Rights and Duties of States should reflect the decisions of the Security Council of the United Nations, given their importance in certain cases of statehood.

125. Furthermore, on the matter of the preservation of an affected population as a people for the purposes of exercising the right of self-determination, his delegation noted the observation in paragraph 199 of the report that the Commission should keep in mind the special historical and legal contexts of the right of self-determination, and emphasized that the principle of self-determination had been transmuted into a right under international law in the course of the decolonization movement, and had always been applied to situations of colonial rule or foreign occupation.

126. Lastly, his delegation noted that there was no binding international legal instrument that specifically addressed cross-border movements induced by climate change and for the protection of persons forcibly displaced due to the adverse effects of climate change, such as sea-level rise. Cyprus remained interested in the development of such an instrument.

127. **Ms. Abu-ali** (Saudi Arabia), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that the Commission should give due weight to the principle of State sovereignty and be mindful of the importance of the immunity of State officials from foreign criminal jurisdiction, which enabled them to fulfil their functions. It should focus on codifying the relevant existing customary international law, on which there was international consensus, rather than seeking to develop new law. For that purpose, it would be useful to review the judgments of domestic courts and relevant State practice. It should consider specifying more clearly and precisely what criminal proceedings could be initiated and what coercive measures could be taken by the forum State. In so doing, it could develop a harmonized global framework that would strengthen State sovereignty and promote legal certainty while preventing the abuse of immunity for political purposes.

128. Referring to the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, she said that the Commission should rely on established sources of international law that reflected a consensus, including international conventions, particularly since several of the draft articles had been opposed by both members of the Commission and Member States.

129. Her delegation welcomed the formulation of draft article 9 (Examination of immunity by the forum State), in which due consideration was given to the specificities of the legal systems of certain forum States, and which provided that, in any event, no criminal proceedings could be initiated or coercive measures taken until the question of immunity had been examined. Draft article 14 (Determination of immunity) should be read against that backdrop. Her delegation believed that the immunity of State officials should be a matter of public policy, and therefore one that the competent authorities of the forum State could determine *proprio motu*, without the need for it to be requested by the State of the official.

130. With regard to draft article 11 (Invocation of immunity), her delegation believed that the right to invoke immunity derived from the principle of State sovereignty and from customary international law. However, that immunity was a matter that should be presumed to exist and did not need to be invoked. The courts of the forum State should operate on that basis when considering the question of immunity. The draft article should thus be redrafted to state that the official was presumed to have immunity, which the State of the official could waive, if it wished to do so, as indicated in draft article 12 (Waiver of immunity). All references to invocation of immunity throughout the draft articles should be revised along those lines.

131. Her delegation had reservations with regard to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply). The definitions of the crimes set forth therein continued to be the subject of debate in the Committee. Moreover, the annex to the draft articles (List of treaties referred to in draft article 7, paragraph 2) included references to international instruments to which not all Member States were parties, and the draft article 7 contained crimes that were not recognized as crimes in the domestic legal systems of all Member States, thus creating a risk that such crimes could be defined more expansively and invoked abusively against the officials of a foreign State.

132. Her delegation supported the idea, which had been raised by some members of the Commission, that conditions could be stipulated for courts of a forum State to be able to exercise jurisdiction over officials of a foreign State. Some of the proposals made in that connection had indeed been included in the draft articles. Her delegation believed that two conditions should be met. Firstly, the evidence against the official should be absolutely conclusive. Secondly, after examining the question of immunity but before exercising criminal jurisdiction, the court of the forum State should endeavour to transfer the proceedings to the courts of the State of the official.

The meeting rose at 1.05 p.m.