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Chair: Ms. Romanska (Vice-Chair) . . . . . (Bulgaria)
later: Ms. Sverrisdóttir (Vice-Chair) . . . . . (Iceland)

Contents

22-24601 (E)

In the absence of Mr. Afonso (Mozambique), Ms. Romanska (Bulgaria), Vice-Chair, took the Chair.

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

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

1. **The Chair** invited the Committee to continue its consideration of chapters VI and IX of the report of the International Law Commission on the work of its seventy-third session (A/77/10).

2. **Mr. Maeda** (Japan), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that his delegation welcomed the adoption on first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction and the commentaries thereto, but reiterated its position that the divergence of views in the Commission on draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) needed to be resolved. Japan hoped that the Commission would provide Member States with a persuasive explanation concerning the draft article.

3. With regard to the topic "Sea-level rise in relation to international law", Japan was fully aware of the pressing nature of the issue of sea-level rise, especially for small island States and low-lying coastal States. Unlike the temporary loss of a territory, the disappearance of a territory and relocation of a population as a result of sea-level rise had never happened in recorded history and the affected States might no longer meet the criteria for statehood as set out in the Montevideo Convention on the Rights and Duties of States. Thus, further consideration was needed on the international law applicable to such a situation. Japan also expected the Commission to examine the applicable international law with regard to the protection of persons affected by sea-level rise.

4. **Mr. Bouchedoub** (Algeria), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that his delegation welcomed the adoption on first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction, whose purpose was to strengthen confidence, mutual understanding and cooperation between a forum State and the State of the official. It appreciated that, in its work, the Commission had sought a balance between the obligations of either State, on the basis of justice and fairness, particularly by including appropriate procedural guarantees to ensure that foreign criminal jurisdiction could not be abused for political purposes. Nevertheless, a comprehensive and integrated approach was needed when codifying and progressively developing international law pertaining to the immunity of State officials from foreign criminal jurisdiction. It was important to take into consideration all eventualities, the range of legal systems of the world, and the relevant domestic laws, State practice, precedents and doctrine.

5. His delegation had reservations regarding draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), which did not reflect the rules of international law. It urged the Commission, as far as possible, to refrain from creating new rules that were inconsistent with the existing rules of international law deriving from custom and international instruments, particularly the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963).

6. His delegation welcomed paragraph 1 of draft article 18 (Settlement of disputes), which provided that, "in the event of a dispute concerning the interpretation or application of the present draft articles, the forum State and the State of the official shall seek a solution by negotiation or other peaceful means of their own choice". That provision gave States an opportunity to defend their rights and interests, while also avoiding the imposition of *fait accompli* situations and thus preserving friendly relations among States. However, his delegation had reservations regarding paragraph 2, which stated that "if a mutually acceptable solution cannot be reached […] the dispute shall, […] be submitted to the International Court of Justice […]", a step that would be compulsory rather than voluntary.

7. Referring to the topic "Sea-level rise in relation to international law", he said that sea-level rise was a pressing issue for Algeria as a coastal State. His delegation encouraged the Study Group on sea-level rise in relation to international law to continue its work over the next five years with a view to finalizing its report and formulating practical conclusions that could provide legal solutions for States affected by sea-level rise and preserve their rights under the law of the sea.

8. **Mr. Aron** (Indonesia) said, concerning the topic "Sea-level rise in relation to international law", that the global phenomenon of sea-level rise posed challenges for present and future generations. It was essential to address its far-reaching implications, including questions associated with maritime zone entitlement, loss of territory or statehood, population migration, the marine environment, the distribution of global fish stocks and marine biodiversity.

9. The second issues paper by the Co-Chairs of the Study Group on sea-level rise in relation to international law (A/CN.4/752 and A/CN.4/752/Add.1) served as a good starting point for future research on statehood and the protection of persons affected by sea-level rise. The Commission must focus solely on the legal aspects of the topic, which were complex and sensitive, with due regard for its mandate in the codification and progressive development of international law. It must avoid speculative scenarios and differentiate between questions of policy and questions of international law.

10. Indonesia encouraged the Co-Chairs to engage actively with States, international organizations and scientific and academic institutions in collecting sources of law and evidence of State practice and *opinio juris* and to include contributions from the general public in its work. Indonesia supported the Study Group's plan to examine the subtopics of the law of the sea in 2023 and statehood and protection of persons affected by sea-level rise in 2024, with a view to finalizing its report on the topic as a whole in 2025.

11. When the United Nations Convention on the Law of the Sea had been negotiated in the 1970s and 1980s, climate change had not been well understood, and as a result the Convention was "climate silent". That posed a number of challenges in the twenty-first century, as the impact of climate change and sea-level rise had become a fact of life. As the world's largest archipelagic country, Indonesia stressed the need for the Commission to identify the interrelationship between the law of the sea and sea-level rise and to strike a balance between the requirement of stability and security in matters relating to the law of the sea and the objective of promoting equity in response to climate change.

12. **Mr. Pangipita** (United Republic of Tanzania), referring to the topic "Sea-level rise in relation to international law", said that as a major maritime and coastal State with several islands, the United Republic of Tanzania attached great importance to the Commission's work on the subject, as should the international community as a whole. For small island developing States like the United Republic of Tanzania, the consequences of sea-level rise were not new: in some cases, populations had had to be relocated from one island to another within the same State.

13. His delegation commended the efforts of the Study Group on sea-level rise in relation to international law to identify legal frameworks and other policy and administrative measures that could apply to the protection of persons affected by sea-level rise. However, legal minds could not address the matter exclusively and exhaustively and thus needed support from experts from other disciplines. The Commission should therefore consider exchanging views with United Nations entities dealing with humanitarian affairs and population displacement on how to address the likely effects of sea-level rise on humankind.

14. On the subtopic of statehood, his delegation endorsed the view expressed by members of the Study Group and delegations that the criteria for the creation and existence of a State should be considered. The preservation of maritime zones and the rights and entitlements that flowed therefrom in the context of sea-level rise should be examined, with due regard for the United Nations Convention on the Law of the Sea and the legal principles underpinning it. The United Republic of Tanzania could not over-emphasize the importance of the Convention, particularly in relation to maritime zones. Nonetheless, it welcomed the Commission's decision to consider other sources of international law beyond the Convention on the matter of statehood. His delegation recommended that general principles and rules of international law, bilateral and multilateral treaties dealing with a range of aspects of the law of the sea and concerning the different areas affected by sea-level rise, as well as the impact of the phenomenon on statehood and the delimitation of maritime and land borders should be taken into consideration in examining the subtopic.

15. His delegation took note of the Commission's intention to revert to the subtopic of the law of the sea in 2023 and to the subtopics of statehood and the protection of persons affected by sea-level rise in 2024, with a view to finalizing a report on the topic as a whole in 2025. It recommended that, in its study, the Commission should engage not only with Member States but also with international and regional organizations and academic institutions around the world, taking due account of the interests of States that were vulnerable to the threat of sea-level rise.

16. **Mr. Azzam** (United Arab Emirates) said, with regard to the topic "Immunity of State officials from foreign criminal jurisdiction", that 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 had remained unchanged from the text that had been raising material concerns in both the Committee and the Commission since 2017. The draft article did not reflect existing international law or State practice or international jurisprudence, a view shared by the majority of States which had commented on it, as well as a notable number of Commission members.

17. His delegation agreed with others that relevant State practice and *opinio juris* were neither widespread nor uniform. The United Arab Emirates strongly supported accountability and national prosecution for international crimes and agreed that immunity was procedural and not substantive. However, the draft article did not achieve the necessary balance between the principle of the sovereign equality of States and the fight against impunity and would have a negative impact on harmonious international relations. His delegation took note of the division among Commission members on the matter and the concerns expressed by certain members, and took the view that no proposal for progressive development of international law on such an important topic should be advanced without broad consensus and the support of the vast majority of States.

18. The United Arab Emirates would therefore not be in a position to commend to the General Assembly a set of draft articles which contained the current draft article 7. It encouraged the Commission to listen to the views of all States in the Committee and to work towards a consensus reflecting the views of all its members.

19. **Mr. Sarufa** (Papua New Guinea) said that his delegation welcomed the engagement by members of the Commission, both in the Committee and with bilateral partners and regional entities such as the Pacific Islands Forum, in work on the important topic of sea-level rise in relation to international law. It greatly appreciated the comprehensive, insightful and important contributions reflected in the second issues paper by the Co-Chairs of the Study Group on sea-level rise in relation to international law (A/CN.4/752 and A/CN.4/752/Add.1) concerning the subtopics of statehood and the protection of persons affected by sea-level rise. Those issues were critically important for the future of Papua New Guinea and its region.

20. His delegation wished to draw attention to the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise issued by the leaders of the Pacific Islands Forum on 6 August 2021. The Declaration was firmly grounded in the primacy of the United Nations Convention on the Law of the Sea as the enduring legal order for the oceans and seas, and was intended as a formal statement of their view on the application of the rules of the Convention in the face of climate change-related sea-level rise. In the Declaration, the leaders had proclaimed that the maritime zones of the members of the Forum, as established in accordance with the Convention, and the rights and entitlements that flowed from them, should continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise. It was the view of Papua New Guinea that the proclamation was supported by both the Convention and the legal principles underpinning it.

21. In the issues paper (A/CN.4/752), the Co-Chairs had identified a number of sources of international law setting out the criteria for the creation of a State as a subject of international law and not for the extinction of a State. Those sources included the Montevideo Convention on the Rights and Duties of States, which was concerned with how an entity became a State, and not how a State might cease to exist. That understanding was reflected in past international practice.

22. As a believer in a strong presumption of continuity of statehood, Papua New Guinea was pleased that, in paragraph 162 of the issues paper, the Co-Chairs had acknowledged that Papua New Guinea had drawn attention to the fact that the preservation of the maritime rights of States was closely linked to the preservation of their statehood, since only States could generate maritime zones. His delegation was also pleased that the Co-Chairs had noted his delegation's point on potential situations of de facto statelessness in paragraph 163 of the paper.

23. In reference to the linkages between statehood and rights and entitlements to natural resources, his delegation believed that the right to self-determination should include the principle of permanent sovereignty over natural resources being a basic constituent thereof, as set forth in General Assembly resolution 1803 (XVII), and that it should be considered in the context of the possible legal implications of sea-level rise for statehood and international legal personality.

24. His delegation appreciated the Co-Chairs' comprehensive mapping of existing legal frameworks potentially applicable to the protection of persons affected by sea-level rise. It supported a dual rights-based and needs-based approach, where international law responses were adequate and effective to meet the essential needs of the persons concerned, with full respect for their rights. The duty of international cooperation was a key principle in that regard. His delegation was also in favour of further clarification and development of international law to respond to the challenges of the protection of persons affected by sea-level rise.

25. Addressing agenda item 78, on crimes against humanity, he said that Papua New Guinea recognized the need to prevent and punish such crimes, which were among the most serious crimes of concern to the international community as a whole. It appreciated the Commission's work on that important topic, including its preparation of the draft articles on prevention and punishment of crimes against humanity, which served as

a good basis going forward. However, it had also taken note of the concerns raised by other delegations, including in terms of areas of possible improvement and clarification in the draft articles. Papua New Guinea was open to a constructive discussion to identify key areas of converging and diverging views on the issue.

26. **Ms. Braidy Spence** (Jamaica) said, with regard to the topic "Sea-level rise in relation to international law", that her delegation commended the Co-Chairs of the Study Group on sea-level rise in relation to international law for recognizing the urgent need to consider the perspectives of small island developing States, where statehood in the event of complete inundation of a State's territory was at stake. While it was critical to further elaborate rules on the future concerning the statehood of affected States, which should support the maintenance of stability and protection of the most vulnerable States, implementing mitigation and adaptation measures was an important element in the collective effort to address the effects of sea-level rise. To fortify its coastline, especially in areas vulnerable to erosion due to rising sea levels, Jamaica had taken steps to protect against beach erosion and storm damage, including through the construction of seawalls, revetments and sand-trapping structures such as groynes.

27. Her delegation welcomed the continued discussion in the Commission and the international community on how international law could support efforts to address the wider causes and effects of sea-level rise, including through the further refining of rules on reducing the effects of climate change and examining how international law might best respond to the immediate and long-term needs of affected States. Although principles could be derived from the existing international human rights legal framework for the protection of persons affected by sea-level rise, that framework needed to be strengthened to fill gaps and address the sea-level rise phenomenon itself.

28. Since sea-level rise was a global phenomenon, international cooperation was important. The success of such cooperation would depend, however, on collective and harmonized responses that reflected the views of all States, including small island developing States, in a fair and balanced manner. In analysing the scope of the principle of international cooperation, the Commission should further elaborate on the obligation of non-affected States to cooperate. It might wish in particular to examine when the obligation arose, the threshold to trigger the obligation, what the obligation entailed and when the obligation ended. The Commission might obtain guidance to that end from other relevant areas of international law, such as international disaster law. It might also be useful for it to consider the provisions relating to cooperation in its work on the protection of persons in the event of disasters, as well as the various ways of State cooperation outlined in article 23 of the International Covenant on Economic, Social and Cultural Rights, including the provision of technical assistance and the holding of regional and technical meetings for the purpose of consultation.

29. **Mr. Edbrooke** (Liechtenstein) said, with respect to the topic "Sea-level rise in relation to international law", that the will of the people most immediately affected by sea-level rise, grounded in their right to self-determination, must be at the centre of all discussions regarding statehood. It fully supported the comments made earlier by the representative of the Alliance of Small Island States in that respect and was pleased to see the right to self-determination listed as an aspect for consideration relevant to the issue of statehood in point (e) of paragraph 167 of the Commission's report (A/77/10).

30. Liechtenstein strongly supported the interpretation put forward in paragraph 199 that "the interests and needs of the affected population should be an essential consideration. In that regard, the preservation of an affected population as a people for the purposes of exercising the right of self-determination should be one of the main pillars of the work of the Commission on the issue". It also supported the presumption of continuity of statehood outlined as a starting point in paragraphs 201 and 231. The elements set out in paragraph 235, in particular those reflected in point (c), were important and realistic. Liechtenstein noted that the right to self-determination also applied to the peoples of non-self-governing territories, including its possible expression through statehood, and therefore encouraged the use of the term "countries" in addition to "States", where appropriate.

31. Liechtenstein looked forward to the Commission's continuing consideration of the subtopics of statehood and the protection of persons affected by sea-level rise and would continue to work with like-minded States to consider legal avenues to fight climate change, including with regard to the issue of sea-level rise as a whole.

32. **Mr. Rabe** (Côte d'Ivoire), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that Côte d'Ivoire remained committed to the rule of law at the national and international levels and was thus opposed to all forms of impunity. It took note of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading.

33. Concerning the topic “Sea-level rise in relation to international law”, he said that Côte d’Ivoire was a coastal State that had been hard hit by rising sea levels, with social, environmental and economic consequences. Almost every year, flooding caused great loss of life and population displacement in the country and put major industrial infrastructure at risk. However, his Government had adopted measures to address the challenges posed by sea-level rise. It was a signatory to the Paris Agreement on climate change and had undertaken an ambitious programme to drastically reduce its carbon dioxide emissions and introduce renewable energies into its energy mix. It also ensured that local populations severely affected by the threat of sea-level rise were relocated to more secure sites.

34. His delegation reaffirmed its support for the work of the Commission and was prepared to participate actively in the search for solutions on the legal aspects of the consequences of rising sea levels.

35. **Ms. Falconi** (Peru) said, with respect to the topic “Immunity of State officials from foreign criminal jurisdiction”, that her delegation recognized the relevance of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, in particular draft articles 3 (Persons enjoying immunity *ratione personae*), 4 (Scope of immunity *ratione personae*), 5 (Persons enjoying immunity *ratione materiae*) and 6 (Scope of immunity *ratione materiae*).

36. Her delegation strongly supported draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) and was particularly pleased that it had been adopted at the seventy-third session without a vote. According to the draft article, immunity *ratione materiae* would not apply in respect of the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance. It was her delegation’s understanding, as the Commission rightly indicated in its commentary, that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed immunity *ratione personae* only during their term of office. The crimes listed undermined human dignity and had been identified by the international community as the most serious, since they shocked the conscience of humankind and must not go unpunished. Her delegation therefore commended the Special Rapporteur and the Commission for their efforts in that regard and for including procedural guarantees in Part Four, to prevent any arbitrariness in the application of the draft article.

37. Peru took note of the reasons for not including the crime of aggression in the draft article. On 14 October 2022, it had deposited its instrument of ratification of the Amendments to the Rome Statute of the International Criminal Court on the crime of aggression, as a testament to its commitment to the search for justice and respect for human dignity.

38. Turning to the topic “Sea-level rise in relation to international law”, she said that there was an urgent need for the international community to address the global implications of sea-level rise for international law, since the phenomenon was global in nature, although it affected more than 70 States directly. It was also of existential importance for low-lying coastal States and small island developing States, with the very survival of the latter States being at serious risk.

39. Her delegation welcomed the second issues paper by the Co-Chairs of the Study Group on sea-level rise in relation to international law (A/CN.4/752 and A/CN.4/752/Add.1), in which they addressed the subtopics of statehood and the protection of persons affected by sea-level rise. In view of the fragmentation of norms and the absence of a specific legal framework for the protection of persons affected by sea-level rise, it was essential to further study existing universal and regional treaties in the areas of human rights law and refugee law, as well as the rules governing migration, disaster prevention and mitigation, and climate change. Her delegation welcomed the fact that the working document planned for 2024 would address essential questions related to the protection of persons. It would be necessary to also consider mechanisms for international cooperation, both for States directly affected by the phenomenon and for potential receiving countries.

40. On the subtopic of statehood, it was noteworthy that, given the absence of State practice, the Co-Chair had taken into consideration historical examples and principles of general international law that might be of relevance, such as the sovereign equality of States, the self-determination of peoples, international cooperation and good faith. As indicated in the issues paper (A/CN.4/752), although there had been no recorded case of the land area of a State being completely submerged, the situation might be different in the future, especially for some small island developing States. The land areas of the territories of some of those States might become partially or entirely submerged in the future and thus uninhabitable. It was therefore of critical importance to continue to address questions relating to statehood, including the criteria for the creation of a State as a subject of international law and the preservation of that status, the legal nature of a territory and the possible legal effects of its loss, the presumption of continuity of the legal personality of a State, the right of a State to

ensure its preservation, the relevance of international law, and alternatives which were only broached in the issues paper.

41. **Ms. Llano** (Nicaragua) said, with regard to the topic "Sea-level rise in relation to international law", that her delegation endorsed the point made in paragraph 191 of the Commission's report (A/77/10) that any reflection on statehood and sea-level rise should include the principle of common but differentiated responsibilities. From a legal perspective, which was indeed the only perspective from which the Commission was required to consider the topic, that principle should be the starting point of any solution. Her delegation also supported the suggestion made briefly in the report to build upon the already existing legal solutions, including compensation for international responsibility.

42. On the subtopic of the protection of persons affected by sea-level rise, she said that the Commission had noted in its report that "relevant State practice at the global level remained sparse", and even more importantly, that it had been "observed that some of the practice identified was not specific to sea-level rise, but generally concerned the phenomena of disasters and climate change". In other words, sea-level rise was only one consequence among many of climate change that might make a territory uninhabitable and cause population displacement. It was not necessary for a territory to be completely submerged for there to be irreversible and possibly enduring consequences. Statistically, desertification and acidification of soils were a much more imminent reality.

43. It was therefore necessary to find comprehensive, practical and fair solutions that could be applied in the future to a situation in which a State might become completely or partially uninhabitable due to sea-level rise or any other consequence of climate change. Such solutions would enable the affected peoples to enjoy their right not only to a clean, healthy and sustainable environment, but also to compensation for the damage caused.

44. **Ms. Aydin Gucciardo** (Türkiye) said, with respect to the topic "Immunity of State officials from foreign criminal jurisdiction", that her delegation wished to reiterate its positions in respect of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, particularly its proposal to have the phrase "with the consent of the State official' included in draft article 12, formerly draft article 11. It also wished to recall its support for the deletion of paragraph 5 of the draft article, which stated that waiver of immunity was irrevocable, given that neither the relevant treaties nor the domestic laws of States had expressly referred to the irrevocability of waivers of immunity, and the practice on that issue was limited.

45. Türkiye took note of the Commission's decision to transmit the draft articles to Governments for comments and observations and might submit further comments on the topic in writing as necessary.

46. On the topic "Sea-level rise in relation to international law", she said that her delegation believed in the need for the promotion of international coordination and cooperation among all countries affected by sea-level rise in the Commission's endeavour. The establishment of the open-ended Study Group on sea-level rise in relation to international law was a crucial step in that regard. Türkiye was aware that sea-level rise could have an impact not only on the environment and the livelihood of coastal communities, but also on statehood, maritime jurisdiction areas and statelessness. Indeed, numerous studies had shown that sea-level rise could have catastrophic effects on small island States and States with low-lying coastal areas. However, in-depth research and analysis were required to assess the potential legal effects of sea-level rise, as the literature in that regard remained immature.

47. In its second issues paper (A/CN.4/752), the Study Group argued that "when analysing the phenomenon of sea-level rise with a particular focus on the issue of statehood, it is worth considering, inter alia, [...] 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". That argument was far-fetched and hypothetical, since, as conceded in the issues paper, "there has not been a situation of a State whose land territory has been completely covered by the sea or that has become uninhabitable for its population."

48. Her delegation was of the view that sea-level rise might affect the final delimitation of areas where maritime boundaries had not yet been delimited. The impact of sea-level rise on statehood and the impact of sea-level rise on rights regarding maritime jurisdiction areas should be dealt with as separate issues and on a case-by-case basis. The Study Group should therefore continue to work on the potential legal effects of sea-level rise and to analyse the inputs from various countries that were affected by the phenomenon.

49. Her delegation had only made preliminary remarks on the second issues paper at the current meeting and would be further assessing it along with future work to be conducted by the Commission on the current topic.

50. **Mr. Moon** Dong Kyu (Republic of Korea), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, in particular draft articles 14 (Determination of immunity), 15 (Transfer of the criminal proceedings), 16 (Fair treatment of the State official), 17 (Consultations) and 18 (Settlement of disputes), aimed to ensure equity and fairness for State officials who would be affected by foreign criminal jurisdiction. His delegation took note that the suggestion regarding the relationship between the topic and international criminal courts and tribunals, originally proposed by the Special Rapporteur as a stand-alone article, had been inserted into paragraph 3 of draft article 1 (Scope), which seemed appropriate. However, in its commentaries to the draft articles, the Commission did not provide a clear explanation as to whether those provisions were firmly based on sufficient State practice or whether it had just intended to create desirable procedures.

51. The Government of Korea would try to submit its comments over the upcoming year after carefully examining whether any part of the current text was in conflict with its domestic laws or related international treaties it had concluded.

52. On the topic "Sea-level rise in relation to international law", he said that his delegation had emphasized the importance of a careful approach to the subtopics suggested, namely the law of the sea, statehood and the protection of persons affected by sea-level rise, given the complexity and sensitivity of the topic. The loss of territory due to sea-level rise raised a fundamental question of international law with regard to State continuity. The importance of the issue could not be overemphasized, given the threat of being submerged that small island States were currently facing. The Commission should limit its role to examining the legal issues that might arise from sea-level rise, rather than seeking solutions to the problems posed by the phenomenon. Since sea-level rise was gradual in nature, the Commission should consider its potential different phases over different periods of time.

53. His delegation hoped that the results of the examination of the law of the sea in 2023 and statehood and the protection of persons affected by sea-level rise in 2024 and the production of a final report in 2025 by the Study Group on sea-level rise in relation to international law would help respond to the challenges posed by sea-level rise and climate change.

54. **Ms. Russell** (New Zealand) said that her delegation commended the Commission for its work on the highly significant topic "Sea-level rise in relation to international law", which was of great importance to States and the international community as a whole, given the likely impact of rising sea levels on low-lying islands and coastal communities. The issue of sea-level rise was close to home for New Zealand and its Pacific Island neighbours, some of whom were expected to experience sea-level rise nine times the global average. Her delegation reiterated its support for the manner in which the Commission had been conducting its work and considered that the approach taken by the Study Group on sea-level rise in relation to international law continued to be apt for the complex nature of the topic. New Zealand remained committed to examining the legal questions relating to the subtopics of statehood and the protection of persons affected by sea-level rise and would actively engage in international and regional processes to that end, including through the Pacific Islands Forum.

55. On the subtopic of the law of the sea, New Zealand reaffirmed its comments made earlier in the year in its submission to the Commission on State practice in relation to the law of the sea and maritime zones. It welcomed the Study Group's future work on the subtopic in 2023. The impact of sea-level rise on maritime zones was a priority issue for New Zealand and other members of the Pacific Islands Forum. Maritime zones and the associated rights to resources were essential to Pacific countries' economies, identities and ways of life. The Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise of the leaders of the Pacific Island Forum set out the region's collective position on how the rules on maritime zones in the United Nations Convention on the Law of the Sea should be applied in the context of climate change-related sea-level rise. In the Declaration, the leaders had taken the position that the preservation of their maritime zones, notwithstanding climate change-related sea-level rise, was supported by the Convention and the legal principles underpinning it. They had also made clear the intention of the States members of the Forum to maintain those zones without reduction.

56. New Zealand welcomed the fact that a large number of geographically diverse States and organizations had endorsed the Declaration's approach and principles. It welcomed in particular the endorsement of the Alliance of Small Island States, the Climate Vulnerable Forum, and the Organization of African, Caribbean and Pacific States.

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

58. The immunity of State officials from foreign criminal jurisdiction should be applied and interpreted taking into account the fact that international law was a congruent legal system. In that connection, in its draft articles on immunity of State officials from foreign criminal jurisdiction, the Commission should take into consideration existing norms in various spheres of contemporary international law. In particular, it should take into consideration the achievements of international criminal law in identifying and punishing the most serious crimes under international law, with combating impunity being an objective of the international community. His delegation therefore supported the Commission's approach with regard to draft article 7.

59. While immunity might appear to be a purely legal issue, it did give rise to political sensitivities that affected inter-State relations. Examples of situations of diplomatic tension between States arising from matters related to the immunity of their officials were legion, and the International Court of Justice had adjudicated various cases concerning the immunity of State officials. It was therefore appropriate for the Commission to contemplate the existence of a regime for the peaceful settlement of disputes between States, as the Special Rapporteur had proposed in draft article 17 of the draft articles proposed in her third report (A/CN.4/739), where she had contemplated the recourse to arbitration or the International Court of Justice.

60. His delegation would continue to examine the current topic and would submit its comments and observations on the draft articles adopted by the Commission on first reading at a later date.

61. Turning to the topic "Sea-level rise in relation to international law", he said that, given the complexity and diversity of the legal issues involved, the Commission should continue its detailed analysis, taking into consideration the comments and practices of States as well as international jurisprudence. It was widely accepted that sea-level rise posed a major risk to the survival and growth prospects of many small island developing States, which in some cases ran the risk of loss of territory. Nonetheless, when examining the issues of statehood and continuity of statehood in the face of the possible loss of territory, the Commission should focus on the legal aspects, in accordance with its mandate to progressively develop and codify international law. The political aspects of the question should be left to States and the international community as a whole.

62. With regard to the outcome of the work of the Study Group on sea-level rise in relation to international law, the Study Group should first focus on possible alternatives for dealing with the issue of sea-level rise, taking into consideration essential instruments such as the United Nations Convention on the Law of the Sea and the Vienna Convention on the Law of Treaties. Given the existence of numerous international norms for the protection of persons affected by the scourge, the Study Group should also examine whether it was necessary to elaborate a draft treaty on the issue or whether there might be solutions within existing international law.

63. The topic posed many complex challenges, including of a legal nature, which needed to be properly assessed. The efforts of States and the international community as a whole must continue to be a central factor in mitigating the effects of climate change, including sea-level rise.

64. *Ms. Sverrisdóttir (Iceland), Vice-Chair, took the Chair.*

65. **Ms. Romanska** (Bulgaria), speaking on the topic "Sea-level rise in relation to international law", said that the United Nations Convention on the Law of the Sea, together with its implementing agreements, was the legal framework governing all activities relating to the oceans and seas and enshrined the delicate balance between States' rights and obligations in the area of ocean governance. The Commission's process of formulating legal conclusions on the topic, including reviewing State and regional practice and *opinio juris*, should therefore only be undertaken on the basis of and with full respect for the integrity and relevant principles and provisions of the Convention.

66. The Convention did not contain a legal obligation for States to regularly review and update their baselines and the delimitation of their maritime boundaries that had been established in accordance with the applicable rules of the Convention. Conclusions that suggested that a periodic review should be carried out by States could have a negative impact on relations between coastal States and might affect stability in different regions of the world, especially where maritime delimitations had already been established. In that regard, the Commission should adopt a careful approach and exercise a high level of caution when considering complex legal questions such as statehood and other issues related to foundational principles of international law.

67. **Archbishop Caccia** (Observer for the Holy See), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that such immunity was a crucial and longstanding principle of State sovereignty and international diplomacy which must be respected in order to ensure peaceful and friendly relations among States. Without it, the threat of prosecution by foreign States could hamper the ability of State officials to discharge their public duties.

68. His delegation noted with appreciation the Commission's adoption on first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction, and welcomed the decision to exclude the question of immunity from the jurisdiction of international criminal courts from the scope of the draft articles, given that the law in that regard was not yet settled. Moreover, it appeared that the legal regime of an international tribunal created by the Security Council under Chapter VII of the Charter of the United Nations would be different from that of a treaty-based court. His delegation noted that the Commission had not contemplated any exceptions or limitations to the immunity *ratione personae* of incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs. Although there had been some calls to prosecute such officials, the Commission's approach was practical and realistic. If the highest State officials were under constant threat of prosecution, orderly relations among States would be impossible. Moreover, in the case of international or civil conflicts, respecting the immunity of those officials would be a prerequisite for the negotiation of any ceasefire or democratic transition.

69. His delegation also welcomed the introduction in draft article 7 of limitations to immunity *ratione materiae* in respect of the most serious crimes of international concern. However, that text reflected only a developing trend in the jurisprudence of some States and did not codify current customary law and practice. Moreover, from a procedural point of view, linking the question of immunity to the nature of the presumed crime would tend to confuse the preliminary question of immunity with the merits of the case. From a practical point of view, there was some value to the view expressed by some Commission members that not all crimes of international concern should necessarily generate limitations to immunity *ratione materiae*. A possible solution would be to limit the exceptions only to those crimes committed systematically or as part of a governmental policy, leaving to the territorial State the duty to prosecute its own public officials for isolated crimes.

70. Referring to the topic "Sea-level rise in relation to international law", he said that understanding the multifaceted legal and technical issues posed by sea-level rise and finding adequate solutions to them constituted a complex undertaking. Furthermore, the issues under discussion were not abstract legal questions: about one quarter of the world's population was threatened by rising sea levels and more than two fifths of the States represented at the United Nations, especially small island Sates and low-lying coastal States, were likely to be directly affected by rising sea levels while many others were likely to be affected indirectly by the displacement of peoples and the loss of natural resources.

71. Given the magnitude of the humanitarian repercussions of sea-level rise, his delegation urged the Commission to give the utmost priority to the legal protection of persons affected by the phenomenon. In that context, his delegation was grateful that in its second issues paper (A/CN.4/752 and A/CN.4/752/Add.1), the Co-Chairs of the Study Group on sea-level rise in relation to international law had provided a detailed analysis of the various legal frameworks that could be used to address the situation of such persons, including human rights law, international humanitarian law, refugee law and environmental law. Regrettably, however, it appeared that none of those legal frameworks, either individually or in conjunction with the others, would provide adequate protection. As noted by the Co-Chairs, the existing law was fragmented, non-specific and often of a soft-law character. His delegation therefore supported their suggestion to develop a new legal regime to protect both those who would be permanently displaced within their own country and those who would be forced to migrate.

72. Concerning the principles that would be applicable to the protection of persons affected by sea-level rise, a rights-based approach appeared to be insufficient to protect victims, particularly in cases where there was no actual link between persons in need and States called on

to protect their rights. His delegation therefore favoured a needs-based approach, which would give priority to the duty to address the urgent but differentiated needs of persons requiring protection. Although persons displaced as a result of environmental conditions did not fall within the internationally agreed definition of refugees, there was no doubt that the situation of those forced to leave their country of origin due to rising sea levels was closer to that of refugees than that of victims in the other models examined. Hence, refugee law could provide a useful model to develop new norms for the protection of those affected by sea-level rise, including the recognition of their right to request asylum, the applicability of the principle of non-refoulement and the right not to be punished for illegal entry.

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

74. **Ms. Sayej** (Observer for the State of Palestine), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that the State of Palestine had consistently held the position that accountability for the most serious crimes of concern to the international community was essential for the integrity and sustainability of the international law-based order. Impunity for crimes had long haunted people around the world and undermined the development of international law; putting an end to it was a collective obligation. From the establishment of the Nuremberg Tribunal to the current activities of the International Criminal Court, international criminal law had proscribed international crimes, especially those of a *jus cogens* nature, and provided an exception to immunity for perpetrators in official positions.

75. Her delegation therefore attached importance to the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, as they helped advance the rule of international law. Her delegation also appreciated the Special Rapporteur's vision and determined work on the topic and continued to study the draft articles and would provide additional written comments subsequently. For the time being, it supported draft article 7, which clearly stated that immunity from the exercise of foreign criminal jurisdiction should not apply in respect of the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance. The lessons of the past demonstrated that the crime of aggression was the supreme international crime, represented the most unlawful form of the use of force, and was accompanied by other crimes. Her delegation therefore encouraged its inclusion in the draft article.

76. Given that the draft articles were at the intersection of different legal regimes, her delegation noted with appreciation the Commission's efforts to address concerns and add procedural safeguards to them. The affirmation in the draft articles of the principle of the peaceful settlement of disputes and of the significant ancillary role played by the International Court of Justice was also welcome.

77. Turning to the topic "Sea-level rise in relation to international law", she said that her delegation welcomed the subtopics of statehood and the protection of persons affected by sea-level rise identified by the Study Group on sea-level rise in relation to international law. Her delegation recognized that the Commission was responding to unprecedented challenges and filling gaps that would help to protect people's livelihoods by developing an inclusive and shared framework. In that effort, however, it should take into consideration certain relevant principles and rules of international human rights law, including the right to a clean, healthy and sustainable environment. In that context, her delegation wished to reiterate that the right to self-determination of peoples affected was unassailable. Sovereignty lay with the people.

78. The State of Palestine was committed to governance of the sea and remained in solidarity with the many communities affected by sea-level rise. That commitment stemmed from the universality and unified character of the United Nations Convention on the Law of the Sea, which was the main legal framework governing all sea-related activities and should play a central role in the Commission's deliberations and outputs on the topic. The Commission's work on sea-level rise addressed the international community's historical responsibilities and obligations to humanity, future generations and the planet; it concerned justice and was underpinned by the principle of the common heritage of humankind. Her delegation therefore looked forward to the development of that work.

79. **Ms. Escobar Hernández** (Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction") said that she was grateful to all Commission members and delegations that had contributed to the discussion of the topic. The large number of speakers and the substantive comments made were a testament to the relevance of the topic and demonstrated that it responded to the Commission's mandate to support the General Assembly in the progressive development and codification of international law, in the current case through an instrument of a regulatory nature.

80. Although the format of the debate had prevented a truly interactive exchange of opinions and there was insufficient time for her to respond to the various comments made on the draft articles on immunity of State officials from foreign criminal jurisdiction adopted on first reading, she wished to note that throughout the years of its work on the topic, the Commission had taken into account the diverse comments and submissions of Member States. Although not all of those opinions had been incorporated into the draft articles, the Commission had worked in a spirit of collegiality and had respected at all times the minimum standards of transparency, offering the Committee the reasons for its decisions relating to the development of the draft articles, without concealing under any circumstances the differences of opinion within the Commission regarding certain issues. Draft article 7 in particular was evidence of that transparency; the commentary thereto reflected all the opinions of the Commission members, including those that diverged from the decision taken by the Commission, thus enabling Member States to form their own views. She urged Member States to prepare their comments and observations on the draft articles and submit them in writing to the Commission. They would be critical to the Commission's examination of the draft articles with a view to their adoption on second reading in 2024.

81. **Ms. Galvão Teles** (Co-Chair of the Study Group on sea-level rise in relation to international law) said that the large number of statements made by delegations on the topic of sea-level rise in relation to international law demonstrated a high level of interest. Delegations' positive comments, questions, criticisms and suggestions on issues requiring further study would be considered during the preparation of the issues paper on the subtopic of the protection of persons affected by sea-level rise. She recalled the request for comments from Member States set out in chapter III of the Commission's report and noted that their responses were an important element of the interaction between the Committee and the Commission and would be important to advancing work on the topic in 2024. The members of the Study Group remained available on an informal basis and were open to participating in workshops and other events, including virtually.

82. **Mr. Ruda Santolaria** (Co-Chair of the Study Group on sea-level rise in relation to international law) said that he was grateful for the comments made by delegations on both the second issues paper and the work of the Study Group as a whole. In view of the global nature of and the existential threat posed to low-lying and small island developing States by sea-level rise, the Commission remained committed to continuing its in-depth analysis of the major legal implications of the phenomenon. He noted the critical need to receive observations from Member States within the established deadline to maintain constant dialogue and reiterated the importance of informal interactions between the Committee and the Commission on the sensitive and urgent issue. He thanked the secretariat of the Commission for its continuous and valuable support.

83. **The Chair** invited the Committee to begin its consideration of chapters VII and VIII of the report of the International Law Commission on the work of its seventy-third session (A/77/10).

84. **Mr. Kvalheim** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and referring to the topic "Succession of States in respect of State responsibility", said that the fifth report of the Special Rapporteur (A/CN.4/751) provided valuable insights concerning the intersection of the law on State succession and the law on State responsibility. The Special Rapporteur's thorough consideration of the comments of States throughout his work was appreciated. In his fifth report, the Special Rapporteur had focused primarily on situations where there were several injured successor States and/or multiple responsible successor States, and did not propose any new provisions. Further, he had written the report with the conclusion of a first reading in sight and had provided ideas for the structure of the final outcome on the topic. The efforts of the Commission to date, summarized in chapter VII of its report (A/77/10), formed a solid basis for further work on the topic. For the time being, the Nordic countries would like to refer to their past comments on the topic and looked forward to providing additional detailed observations as the Commission's work progressed.

85. The Nordic countries took note of the Commission's decision that the work on the topic would take the form of draft guidelines, rather than draft articles. While they had previously expressed a preference for draft articles in order to maintain consistency with the Commission's earlier work, they were not opposed to draft guidelines; most important was the development of a well-drafted and balanced set of provisions that would be useful in practice. State succession was a rare occurrence and examples of State practice were limited. The Commission should therefore maintain a prudent approach and continue on the basis of the excellent groundwork laid by the outgoing Special Rapporteur. The Nordic countries looked forward to further collaborating with the Commission on the topic.

86. Regarding the topic "General principles of law", he said that the third report of the Special Rapporteur (A/CN.4/753) provided a solid foundation that complemented the Commission's past work on the principal sources of international law. The Nordic countries agreed with the Special Rapporteur's general approach and reiterated that caution was warranted given the many sensitivities at play and the significance of the topic. The thoroughness of the Special Rapporteur's work and the broad survey of relevant State practice, jurisprudence and teachings were to be commended. The Commission's work on the topic must remain sufficiently anchored in the primary sources of international law. It was also important that the conclusions drawn were adequately related to the practice and opinion of States, and that work on the topic was not based excessively on subsidiary means for the determination of law, namely judicial decisions and the opinions of individual publicists.

87. While the Nordic countries agreed that there was no formal hierarchy between the primary sources of international law, they also stressed that general principles of law in practice played a subsidiary role, mainly as a means of interpretation, filling gaps, or avoiding situations of *non liquet*. The International Court of Justice had only rarely referred explicitly to principles of international law, and when it did, it was primarily in the context of procedural obligations rather than substantive law obligations. In light of the cases cited in the third report of the Special Rapporteur, the Nordic countries stressed that the fact that the term "principle" was used in the course of a legal argument did not necessarily mean that it was being used, in a legal sense, as a reference to a legal source per se or that it supported the existence of a certain principle as a legal source per se. It was important to distinguish clearly and systematically between practice supporting the existence of a general principle or general principles as a source of law and cases where use of the term "principle" might not be intended to refer to, or could not be justified as referring to, a general principle in the sense of Article 38, paragraph 1 (*c*), of the Statute of International Court of Justice.

88. With regard to the draft conclusions on general principles of law provisionally adopted by the Drafting Committee, the Nordic countries welcomed the decision to replace the term "civilized nations" with the more updated and appropriate phrase "community of nations" in draft conclusion 2 (Recognition) and in paragraph 1 of draft conclusion 7 (Identification of general principles of law formed within the international legal system), but reiterated that the term "international community of States" was preferable, as it was clearer and more in line with standard terminology, and better reflected the fact that States were the primary subjects of international law.

89. The Nordic countries agreed with the indication in draft conclusion 3 (Categories of general principles of law) that general principles could either be derived from national legal systems or formed within the international legal system. However, it would be preferable to have more instances of State practice and *opinio juris* to support the conclusions drawn in the commentary thereto. The Nordic countries also agreed with the two-step approach to the identification of general principles derived from national legal systems, set out in draft conclusions 4 (Identification of general principles of law derived from national legal systems), 5 (Determination of the existence of a principle common to the various legal systems of the world) and 6 (Determination of transposition to the international legal system). The second criterion in draft conclusion 4, namely, that a principle derived from national legal systems must be transposable to the international legal system, was particularly important.

90. While the Nordic countries agreed that general principles of law could also emanate from the international legal system, as highlighted in draft conclusion 7, they noted that there were some inconsistencies in the formulations of paragraphs 1 and 2 of the draft conclusion. Paragraph 1 stipulated as a condition for the determination of a general principle of law that the community of nations should have recognized the principle as intrinsic to the international legal system. Paragraph 2, on the other hand, envisioned a possible existence of general principles of law formed within the international legal system on conditions other than those referred to in paragraph 1, which called into question the relevance of the proposed condition in paragraph 1. The Nordic countries supported the approach taken in paragraph 1.

91. While the Nordic countries agreed with the basic assertions in draft conclusions 8 and 9 that decisions of courts and tribunals and teachings of the most highly qualified publicists might serve as subsidiary means for the determination of general principles of international law, they considered their inclusion to be unnecessary and inappropriate. The relevance of judicial decisions and teachings in the determination of international law was a matter best considered in the context of work specifically concerning subsidiary means for the determination of rules of international law, a topic which had recently been added to the Commission's programme of work.

92. The Nordic countries welcomed the proposed formulation of draft conclusion 10 (Functions of general principles of law) as an accurate reflection of the actual function of general principles of law in international legal practice, namely the residual characteristic of that particular source of international law and its relevance in terms of contributing to the coherence of the international legal system. The Nordic countries encouraged the Special Rapporteur and the Commission to consider whether it would be better to have the particular traits identified in the points lettered (a) and (b) in paragraph 2, highlighted in the commentaries to the draft conclusions, as they were traits common to all primary sources.

93. The Nordic countries also welcomed the proposed structure and formulation of draft conclusion 11 (Relationship between general principles of law and treaties and customary international law), as it offered an accurate reflection of the basic interplay between general principles of law and the other primary sources of law, namely treaties and customary international law. Preferably, paragraph 1 could account for the subsidiary and residual role of general principles and the fact that the primary sources were commonly operationalized in successive order. For example, the word "formal" could be added before "hierarchical", so that the paragraph would read: "General principles of law, as a source of international law, are not in a formal hierarchical relationship with treaties and customary international law."

94. Lastly, the Nordic countries supported the proposed outcome of the topic to be draft conclusions accompanied by commentaries.

95. **Mr. Toh** (Singapore), speaking on the topic "Succession of States in respect of State responsibility", said that his delegation had taken note of the change in the form of the Commission's final output on the topic from draft articles to draft guidelines and the Special Rapporteur's proposed new scheme for the consolidation and restructuring of the draft provisions referred to the Drafting Committee at previous sessions. Regardless of the form of the final output, however, primacy should be accorded to agreements entered into by the concerned States and the text should be concise, balanced and serve as useful practical guidance to States.

96. On the topic "General principles of law" and the draft conclusions on general principles of law provisionally adopted by the Drafting Committee, his delegation noted that there had been a robust discussion concerning the category of general principles of law that might be formed within the international legal system, identified in the point lettered (b) in draft conclusion 3 (Categories of general principles of law). His delegation had not concluded whether that category actually existed. On one hand, its existence seemed to be supported by certain principles of law, including sovereign equality, a fundamental tenet of international law that established the uniform legal personality of States and upon which the international legal order was built, and State consent to binding dispute settlement, which was a corollary to and an expression of sovereign equality. Both principles were cited in the commentary to draft conclusion 7 (Identification of general principles of law formed within the international legal system). On the other hand, his delegation agreed with the concerns that had been raised regarding whether there was sufficient State practice, jurisprudence or teachings to support the existence of general principles of law that might be formed within the international legal system and to determine the methodology for their identification.

97. That methodology should be sufficiently strict so that the requirements for identifying rules of customary international law, including State consent to be bound, were not undermined or bypassed. However, the criteria should not be so rigid that identification of such general principles became impossible. In that regard, his delegation had several issues with the methodology formulated under draft conclusion 7. The criterion provided in paragraph 1 was unclear; in particular, it was unclear how it could be ascertained that the "community of nations" had "recognized" such principles and what circumstances would constitute such "recognition". It was also unclear what it meant for a principle to be "intrinsic to the international legal system". Those uncertainties were not clarified in the commentaries. In addition, the caveat under paragraph 2 that the criterion was "without prejudice to the question of the possible existence of other general principles of law formed within the international legal system" was overly broad and threatened to undermine the criterion completely.

98. The Commission should be careful not to conflate the category of general principles of law that might be formed within the international legal system with treaties and customary international law. His delegation therefore welcomed the Commission's work on clarifying the relationship between those sources of international law in draft conclusions 10 (Functions of general principles of law) and 11 (Relationship between general principles of law and treaties and customary international law). There remained issues to be resolved in that regard. For example, it was not clear how the Commission intended to reconcile the gap-filling function of general principles of law, described in

paragraph 1 of draft conclusion 10, with the need to resort to "generally accepted techniques of interpretation and conflict resolution in international law" to resolve conflicts between a general principle of law and a rule in a treaty or customary international law, as provided in paragraph 3 of draft conclusion 11. His delegation therefore looked forward to further debate on the draft conclusions and on the topic generally.

99. **Mr. Hmoud** (Jordan), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that the dedicated work of the Special Rapporteur on the topic had led to the adoption by the Commission on first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction. Despite the immense pressure put on the Special Rapporteur on the issue of exceptions to immunity *ratione materiae*, she had refused to politicize the matter or to compromise her principled position, which had led to her not being re-elected to the Commission in 2021. His delegation commended the Special Rapporteur for her stance and hoped that the Commission would uphold her legacy when it considered the draft articles on second reading.

100. As a result of the Special Rapporteur's efforts, the Commission had nonetheless been able to reach an agreement on the procedural aspects related to immunity that provided safeguards and guarantees against politicized prosecution, especially in the case of exceptions to immunity in draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply). His delegation urged other delegations to consider accepting those safeguards and guarantees as they examined the content of the draft article. The balance between the rights of the State of the official, the rights of the forum State and the rights of the official should be preserved. The crime of torture, listed as an exception to immunity in the draft article, was of particular concern, as it could be misused against officials of another State for political purposes.

101. Part Two of the draft articles reflected his delegation's position that immunity *ratione personae* was absolute for Heads of State, Heads of Government and Ministers for Foreign Affairs under customary international law. His delegation did not believe that paragraph 3 of draft article 1 (Scope of the present draft articles), on the rights and obligations of States parties under agreements establishing international criminal courts and tribunals, was necessary. However, the consensus reached on that paragraph preserved the rights of the State of the official against judicial advocacy and it was made clear in the commentary that the absolute nature of the immunity *ratione personae* of incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs was not affected.

102. His delegation welcomed draft article 12 (Waiver of immunity), which, in line with the relevant treaties on privileges and immunities, indicated that a waiver of immunity must be express and in writing. His delegation also welcomed the incorporation of draft article 15, on the transfer of criminal proceedings to the State of the official, which achieved an appropriate balance between the legal interests of the forum State and those of the State of the official. His delegation would have preferred draft article 18 (Settlement of disputes) to include a provision on the suspension of criminal proceedings as part of the dispute-settlement mechanism, and hoped that the text adopted on second reading would contain a provision on the suspensive effects of the invocation of dispute settlement. His delegation welcomed paragraph 3 of draft article 14 (Determination of immunity), which was an important safeguard against sham prosecutions under draft article 7.

103. Turning to the topic "General principles of law", he said that his delegation continued to have serious doubts about the existence of general principles of law that might be formed within the international legal system, which had only been proposed in literature and some academic writing. The designation of that category was not supported either by State practice or by the opinions of the International Court of Justice. Even the examples mentioned in the reports of the Special Rapporteur were essentially examples of customary rules that had been confused with general principles of law, owing in part to the wording used by courts and tribunals to describe them, such as "general principles of international law", "general international law" and "principles of international law".

104. With regard to the draft conclusions on general principles of law provisionally adopted by the Commission, his delegation was concerned in particular that the category of general principles of law formed within the international legal system, identified in draft conclusion 7, could be confused with customary international law and could leave room for legal activism, whereby certain principles were advanced as being "recognized" by "the community of nations" as "intrinsic to the international legal system". His delegation was concerned that the novel methodology for identification, which was described in the commentary to the draft conclusion as being inductive and deductive and appeared to confuse customary rules with general principles of law, could be used to bypass the stringent process for the identification of customary international law.

105. The Special Rapporteur had received much criticism for proposing the deductive approach in his second report (A/CN.4/741 and A/CN.4/741/Corr.1). In his third report (A/CN.4/753), he had added an inductive approach, to end up with a "deductive-inductive approach", which was again both novel and unimplementable. It would have been preferable for the Commission to include a without prejudice clause in respect of general principles of law that might be formed within the international legal system, as the majority of Commission members had either denied the existence of or expressed doubts about such principles. It was regrettable that those reservations had not been reflected in the commentaries to draft conclusions 3 and 7, which had been provisionally adopted by the Commission; the commentaries in fact gave the opposite impression. His delegation hoped that the Commission would reconsider its position and rewrite draft conclusion 3 to include a without prejudice clause, so it did not give an imaginary category more value than it deserved.

106. With regard to the topic "Succession of States in respect of State responsibility", he said that while his delegation appreciated the efforts of the Special Rapporteur, it was disappointed with the outcome of the work on the topic. In a rush to conclude the first reading, the Commission had agreed to change the form of the outcome from draft articles to draft guidelines, but had not changed the content of the text. The result was a disjointed hybrid set of draft articles and draft guidelines which were not based on State practice and could not be adopted on first reading. His delegation hoped that the Commission would reconsider the topic in 2023 and remove it from its programme of work.

107. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation fully supported the Commission's work, which would have practical consequences on the international community's response to sea-level rise. As had been noted by several of its members, the Commission should be cautious about suggesting the presumption of continuity of statehood. The examples contained in the second issues paper (A/CN.4/752 and A/CN.4/752/Add.1) did not provide convincing evidence of that presumption. The goal should be to find practical legal solutions to issues related to statehood resulting from sea-level rise.

108. Lastly, regarding "Other decisions and conclusions of the Commission", his delegation looked forward to the inclusion of the topic "Non-legally binding international agreements" on the Commission's current programme of work. It welcomed the Commission's decision to include the topics "Prevention and repression of piracy and armed robbery at sea", "Subsidiary means for the determination of rules of international law" and "Settlement of international disputes to which international organizations are parties" in its current programme of work.

109. **Mr. Ferrara** (Italy), speaking on the topic "Succession of States in respect of State responsibility", said that the fifth report of the Special Rapporteur (A/CN.4/751) was comprehensive and dealt with essential issues like plurality of States in the context of succession, especially in cases of continuing or composite acts, and reparation for injury resulting from wrongful acts committed by a predecessor State or against a predecessor State. His delegation welcomed the Commission's decision to change the form of the outcome on the topic from draft articles to draft guidelines, in view of the limited State practice on the issue. That preferred form, described by the Special Rapporteur in his report as a "softer" outcome, still had the potential to preserve the consistency of the general rules of State responsibility and to help in the development of guidelines in fields that had not yet been regulated by international law.

110. Referring to the draft articles succession of States in respect of State responsibility adopted by the Commission at its seventy-first and seventy-second sessions, which had been revised by the Drafting Committee to the form of draft guidelines, he said that his delegation strongly supported the *lex specialis* principle affirmed in draft guideline 1 (Scope), and also shared the view, expressed by the Commission in its report (A/77/10), that agreements between the States concerned had priority over the draft guidelines.

111. With regard to the draft guidelines provisionally adopted by the Commission at its thirty-third session, the Special Rapporteur's efforts to find a balance between the continuity of rights and obligations from the predecessor State to the successor State and the "clean slate" doctrine were to be commended. In that respect, his delegation agreed with the wording of draft guidelines 10 (Uniting of States), 10 bis (Incorporation of a State into another State) and 11 (Dissolution of a State), which highlighted the crucial role of agreements between the concerned States in addressing injury resulting from internationally wrongful acts. His delegation took note of the scarcity and inconsistency of State practice with reference to particular forms of wrongful conduct, including actions or omissions defined in aggregate as wrongful, mentioned in draft guideline 7 bis.

112. Regarding the topic "General principles of law", he said that his delegation welcomed the adoption by the Commission of draft conclusions 1, 2, 3, 4, 5 and 7 of

the draft conclusions on general principles of law proposed by the Special Rapporteur in his third report (A/CN.4/753), and would follow with interest the debate on the other draft conclusions. In general terms, his delegation believed that the discussion on the nature of general principles of law as an independent source of international law and the methodology for their identification should continue. Defining a shared methodology, particularly concerning general principles that might be formed within the international legal system, was especially important and essential to clarifying whether a distinction existed between general principles of law and customary international law. Consequently, particular attention should be devoted to the requirements for the emergence of a rule of customary international law and the requirements for the ascertainment of a general principle of law.

113. His delegation had taken note of the Special Rapporteur's approach of basing the Commission's work on the topic on both general principles of law *in foro domestico* and general principles of law formed within the international legal system. His delegation shared the view that the process of ascertaining the transposition of general principles of law derived from national legal systems to the international legal system should be undertaken with care, in order to avoid the risk of overriding the will of States in the establishment of rules of international law.

114. Meanwhile, the debate over the existence of general principles of law formed within the international legal system as an autonomous source of law, separate from customary law, was still ongoing. Given that the main objective of adopting the draft conclusions was to provide guidance to interpreters, the Commission should be cautious about mentioning the existence of general principles of law formed within the international legal system in the draft conclusions. However, if, following further study, such principles were deemed to exist, his delegation suggested that the Commission reconsider its use of the expression "that may be formed", in point (b) of draft conclusion 3 and paragraph 1 of draft conclusion 7, and the inclusion of paragraph 2 of draft conclusion 7.

115. His delegation took note of the Special Rapporteur's view that, assuming that treaties, customary international law and general principles were not in a hierarchical relationship, antinomies should be resolved in the light of the *lex specialis* principle. His delegation was carefully following the debate concerning draft conclusions 10 (Absence of hierarchy between the sources of international law), 11 (Parallel existence) and 12 (*Lex specialis* principle), which were dedicated to the functions of general principles and their relationship with other sources of international law. Those issues were at the heart of the topic and were essential to clarifying the nature of general principles as autonomous sources of law or as interpretative tools.

116. Lastly, his delegation welcomed the suggestion to merge and rephrase draft conclusions 10, 11 and 12 and to omit any reference to hierarchy between sources of international law. It would also consider submitting written comments at a later stage.

117. **Mr. Amaral Alves De Carvalho** (Portugal), referring to the topic "Succession of States in respect of State responsibility", said that the lack of coherent and consistent international practice complicated any exercise of codification. His delegation thus welcomed the Commission's decision to turn the draft articles on succession of States in respect of State responsibility into draft guidelines, which could nonetheless still contribute significantly to clarifying the issue. His delegation also took note of the reassurance given by the Special Rapporteur in his fifth report (A/CN.4/751) that he did not intend to question or rewrite the general rules on State responsibility. It agreed with the principle, reiterated by the Special Rapporteur in his report, that the final product was subsidiary in nature and that priority should be given to agreements between the States concerned.

118. His delegation agreed with those that considered the concept of equity in the distribution of responsibilities among successor States as indispensable. However, given the uncertainty underlying the concept, it was also important to examine more closely how it had been used in the various historical examples of State succession. Regarding the draft guidelines on succession of States in respect of State responsibility provisionally adopted by the Commission, his delegation did not find a justifiable reason to use different methodologies and terminologies in draft guidelines 11 (Dissolution of a State) and 14 (Dissolution of a State), and would welcome clarification in that regard. In addition, it was unclear whether the reference to a successor State in draft guideline 12 (Cases of succession of States when the predecessor State continues to exist) included the same situation addressed in draft guideline 13 (Uniting of States). While that seemed unlikely, clarification on the exact scope the two provisions and their intersections would be welcome. His delegation had followed the Commission's work on the topic and looked forward to the completion of the first reading.

119. The topic "General principles of law" gave the Commission the opportunity to complement its work on other sources of international law and to provide

additional guidance on the nature, identification and application of general principles of law, as well as on their relationship with other sources of international law. In view of the Commission's fundamental role as an active interpreter and advisory body on international law, it was important that it present clear solutions concerning the sources of international law.

120. Referring to the draft conclusions on general principles of law provisionally adopted by the Drafting Committee, he reiterated his delegation's position, with respect to paragraph 3 of draft conclusion 5 (Determination of the existence of a principle common to the various legal systems of the world), that national courts might rely on sources of law different from those applicable under international law. Furthermore, those different sources of law might be organized according to a hierarchy specific to different legal systems. That should be taken into consideration when analysing the decisions of national courts for determining the existence of a general principle of law. His delegation would welcome draft conclusions on the usefulness or significance of other subsidiary means for the determination of general principles of law, which could cover, for example, resolutions of the United Nations or international expert bodies and outputs of the Commission.

121. While studying the topic, the Commission should avoid establishing a hierarchy between the various sources of international law. In that respect, his delegation welcomed paragraph 1 of draft conclusion 11 (Relationship between general principles of law and treaties and customary international law), which affirmed the absence of such a hierarchy. General principles of law, in addition to serving as an ethical and normative model for other norms, had a supplementary role of filling gaps and avoiding situations of *non liquet*.

122. His delegation's full statement would be made available for publication on the website of the Committee.

123. **Mr. Evseenko** (Belarus) said, with regard to the topic "Succession of States in respect of State responsibility", that his delegation continued to favour a cautious approach to the presumption of succession in situations where the predecessor State ceased to exist. In such instances, it was important to take account of all factors, for example the circumstances surrounding the cessation of the predecessor State and the degree to which any successor State had participated in the governing of the predecessor State, and thus in the commission of an internationally wrongful act. His delegation recognized that the topic was highly context-specific and sensitive and that related issues were generally settled on an ad hoc basis.

124. His delegation agreed with the priority to be given to agreements between the States concerned, bearing in mind the draft guidelines on succession of States in respect of State responsibility provisionally adopted by the Commission. In that regard, it agreed with the assertion in the commentary to draft guideline 6 (No effect upon attribution) that an internationally wrongful act occurring before the date of succession remained attributable to the State that committed it. That draft guideline was valuable, given that it might refer to other draft guidelines closely linked to questions of succession of States concerning responsibility for, inter alia, acts having a continuous character or composite acts that violated international law. In his delegation's view, draft guideline 7 bis (Composite acts) was very important, since it expanded upon draft guideline 7 (Acts having a continuing character), previously adopted by the Commission as draft article 7, by indicating that the incidence of a State succession had no impact on the responsibility of a predecessor State for a composite act whose components were entirely attributable to it.

125. His delegation concurred with the explanation given in the commentary to draft guideline 10 (Uniting of States) that the guideline was intended to encourage States to seek a solution to questions of international responsibility in situations of a merger between States, and that the wording was sufficiently flexible to give States the freedom to choose the modalities of the agreement. That concerned not only the possibility and the fact of the start of a negotiation process between States, but also its continuation for the purposes of reaching an agreement.

126. Draft guideline 10 bis (Incorporation of a State into another State) seemed important, given its presumption that the obligations of a State flowing from an internationally wrongful act were not automatically transferred to another State into which that State had been incorporated. Draft guideline 11 (Dissolution of a State) was also important, since it provided, in the case of an injury, for the injured State and the successor State to reach agreement on how to address the injury. However, the need for such an agreement might not apply to all successor States to an equal extent, as some might have a closer connection with the wrongful act or the injury than others.

127. With regard to the topic "General principles of law", he said that his delegation shared the Special Rapporteur's view about the complexity of the subject matter and the need for a comprehensive analysis in the

study thereof. For any principle of international or domestic law to attain the status of a general principle of law, it must be universally recognized, and not just by particular groups of States, such as “civilized” States, or particular legal systems, even if such systems were referred to as “principal” systems. General principles of law were universal; they must therefore form the basis of all legal systems, whether international or domestic, without exception. They should be principles recognized by the international community as a whole and represent “primary rules”, not “secondary rules”. Those assumptions would probably complicate the Special Rapporteur’s work, but at the same time would make it very valuable. Norms identified based on those criteria might ultimately be regarded as the foundation of contemporary international law.

128. His delegation looked forward to the outcome of the Commission’s work on the methodology for identifying general principles of law, taking into account the need to maintain the consensus that had been reached on the scope of the topic, the methods for its study and the final form of the Commission’s output. It supported the Special Rapporteur’s intention to consider, in his next report, the functions of general principles of law and their relationship with other sources of international law.

The meeting rose at 6 p.m.