United Nations A/C.6/77/SR.26

General Assembly
Seventy-seventh session

Official Records

Distr.: General
12 December 2022

Original: English

Sixth Committee

Summary record of the 26th meeting
Held at Headquarters, New York, on Friday, 28 October 2022, at 10 a.m.

Chair: Mr. Afonso . . . . . (Mozambique)
later: Ms. Sverrisdóttir (Vice-Chair) . . . . . (Iceland)

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22-24338 (E)

The meeting was called to order at 10 a.m.

Statement by the President of the International Court of Justice

1. **Ms. Donoghue** (President of the International Court of Justice) said that she had previously served as a foreign ministry lawyer with an outsider observer's perspective on the functioning of the International Court of Justice. Since joining the Court in 2010, she had gained a deeper understanding of certain aspects of the Court's work and procedures. In the light of that experience, she would be speaking about the institution of the judge ad hoc within the Court, the Court's role as a court of first instance, and the pace of proceedings before the Court.

2. Under Article 31 of the Statute of the International Court of Justice, a State that was party to a case could choose a judge ad hoc whenever the Court did not include upon the bench a judge of that State's nationality. Once appointed, the judge ad hoc took part in the decisions in that case on terms of complete equality with the 15 members of the Court. The Court had inherited the institution of the judge ad hoc from its predecessor, the Permanent Court of International Justice. The Advisory Committee of Jurists appointed by the League of Nations to draft the Statute of the Permanent Court of International Justice in 1920 had been sharply divided on the issue, with some of the drafters voicing concerns that the figure of the judge ad hoc was a creature of arbitration that had no place in a standing judicial body. Proponents of the institution had hoped that judges ad hoc would contribute their specialized knowledge of the appointing State's legal system to the Court, and that judge ad hoc appointments would serve to maintain equality between the parties in cases where only one of them had one of its nationals among sitting judges.

3. It had been assumed that a State would choose a judge ad hoc from among its own nationals, and the term "national judges" had therefore been used to refer to such judges in the Advisory Committee's exchanges, the 1922 Rules of Court of the Permanent Court of International Justice and the early judgments of the International Court of Justice. Although the reference to nationality had subsequently been removed from the Rules of Court, during the era of the Permanent Court of International Justice and in the earlier decades of the International Court of Justice, States had continued to select their citizens as judges ad hoc in the vast majority of cases. More than 80 per cent of the judges ad hoc appointed in contentious cases initiated during the first 10 years of the Court's existence had been nationals of the appointing States. However, the practice had changed markedly over time and, in the case of more recent appointments, the numbers were reversed: about 80 per cent of the judges ad hoc appointed in the past decade had not been nationals of the appointing State, suggesting that, in many cases, appointing States had not attached importance to an ad hoc judge's expertise in their national law.

4. Another intended objective of the appointment of a judge ad hoc was to ensure equality between two parties to a case. It was also possible to put the parties on equal footing by precluding a member of the Court from sitting in cases to which his or her State of nationality was a party. The latter approach might seem to be an attractive alternative if one believed that the primary value of the appointment of a judge ad hoc lay in the judge's potential to neutralize the opposing views and vote of a judge of the nationality of the other party. However, even if a State named as judge ad hoc someone who would slavishly vote in the State's favour, a guarantee of one favourable vote out of 16 or 17 was of very limited value to the appointing State in most cases. While the appointment of a judge ad hoc was not mandated under the Statute of the International Court of Justice and the parties to a case could agree that neither of them would make such an appointment, in practice, the parties had done so only a handful of times in the Court's history, suggesting that States regarded the possibility of appointing a judge ad hoc as valuable even in cases where no question of equalizing their respective votes arose.

5. A third rationale for the institution of judges ad hoc discussed in the Advisory Committee of Jurists in 1920 had to do with the larger goal of persuading States to place their trust in a world court. It was thought that the possibility of appointing a judge ad hoc would reassure States that there would be at least one person upon the Court who was able to understand them, and that if States could not be assured of representation, they would not assent to the Court's jurisdiction. Over time, the institution of the judge ad hoc had evolved within the Court. Judge ad hoc Elihu Lauterpacht had observed in a separate opinion in the case *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, in 1993, that a judge ad hoc had the special obligation to endeavour to ensure that, so far as was reasonable, every relevant argument in favour of the party that had appointed him had been fully appreciated in the course of collegial consideration and, ultimately, was reflected – though not necessarily accepted – in any separate or dissenting opinion of the judge ad hoc. At the same time, judges ad hoc, like members of the Court of the nationality of a party, would lose credibility in the deliberation room if they constantly took the floor to

advocate the views of the appointing State or State of nationality. There was a strong feeling in the Court that a judge ad hoc should not be an extra advocate for the appointing State. Increasingly, appointing States focused on identifying persons who – irrespective of their nationality – had extensive knowledge of the Court and its procedures, had expertise relevant to the subject matter of a case and were likely to be seen as credible and fair by the members of the Court.

6. Recent practice confirmed the importance and continued relevance of the institution of the judge ad hoc. The basic proposition put forward by the drafters of the Statute of the Permanent Court of International Justice a century earlier was still sound: there was real value in an institution that strengthened the confidence of every State that its arguments and equities would be fully appreciated and duly considered as part of the Court's deliberations. Judges ad hoc performed an important role in the private deliberations of the International Court of Justice, and the Court as a whole benefited from their appointment. Noting that the judges ad hoc named by States were overwhelmingly nationals of developed countries and, with rare exceptions, men, she encouraged Member States not to overlook candidates who hailed from developing countries and those who were women. The diversity that such candidates brought would enrich the Court's deliberations.

7. Turning to the Court's often-overlooked role as a court of first instance, she said that, in addition to being charged with answering questions of law, the Court faced procedural issues much like those faced by national courts of first instance, such as requests for extension of time and whether to permit the introduction of new evidence just hours before the start of a hearing. In many national courts a single judge decided such issues and often ruled from the bench immediately after being presented with a procedural question. Although, in some circumstances, the President of the Court was empowered to take certain procedural decisions alone when the Court was not sitting, in practice, with rare exceptions, the full Court participated in decisions on procedural matters, including those that might seem minor. The approach reflected the importance that parties attached to procedural matters about which they often strenuously disagreed. All judges were keenly aware that the procedures must conform to the principles of fairness and equality of arms, but they often differed on how those principles should be given effect and their views were sometimes shaped by practices in their national courts, experiences as counsel or service on another international court. By taking decisions on procedural questions collectively, the Court ensured that the diverse views of all judges were taken into account and helped to build a consistent practice over time that drew on the diverse perspectives of judges from many different legal systems.

8. In its role as a court of first instance, the Court also assessed the evidence presented by the parties to prove their claims and defences, which included consideration of which methods of proof it found persuasive, the way in which evidence was weighed and the manner in which scientific and technical evidence was obtained. The way in which national courts of first instance approached such evidentiary issues depended on whether they were influenced by common law or civil law traditions. The International Court of Justice was neither a common law court nor a civil law court, and its Statute and Rules allowed approaches drawn from both traditions.

9. With regard to methods of proof, under the Court's Statute and Rules, the parties could introduce both documentary evidence and witness testimony and there was no hierarchy among the various kinds of evidence. However, in its judgments, the Court had indicated a preference for documentary evidence over witness testimony, which reflected the practice in civil law States. It treated evidentiary materials prepared for the purposes of a case, as well as evidence from secondary sources, with caution. The Court also usually gave particular attention to reliable statements acknowledging facts or conduct unfavourable to the State with which the person making the statement was associated.

10. When weighing evidence, the Court's judgments had made it increasingly clear that the burden of proof lay with the party asserting a particular fact, while showing flexibility in certain circumstances, such as where evidence relevant to a particular fact was not available to the party asserting it, but was instead available to the opposing party. The Court's practice was not to articulate a particular standard of proof, as was often done by national courts of first instance that followed the common law tradition. Instead, the standard of proof to which parties were held in a particular case had to be inferred from the Court's judgments. The Court's reticence to articulate a specific standard of proof fitted with the civil law tradition and had been criticized at times by judges hailing from the common law tradition.

11. With regard to the Court's approach to expert evidence on scientific or technical matters, under its Statute and Rules the parties had the option to present the views of experts who could then be cross-examined by the opposing party during the hearing, much like in common law courts. The Statute and Rules also

provided that the Court itself could appoint experts, as courts of first instance often did in civil law systems. The Court had done so in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, where it had appointed four experts to assist in the assessment of compensation for three categories of damages alleged by the Democratic Republic of the Congo, and in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, where the Court had arranged for an expert opinion on the state of a specific portion of the coast relevant to the establishment of the maritime boundary between the two States.

12. As the examples provided showed, given the differences in the approaches to evidence and procedure between domestic courts of first instance and the International Court of Justice, when disagreements over evidence were an important aspect of a case, or when procedural decisions were believed to be particularly consequential, it was crucial for a party's legal team to be well versed in the Court's practices and case law on evidentiary and procedural matters, as well as its pronouncements on the law.

13. Lastly, recalling the critiques of the pace of work of the Court shared with her by close observers of the Court in the period preceding her election, and which were also often reflected in scholarly works, she said that, she had, in particular, been told that the Court worked on only one or two active cases at any given time and that its internal proceedings were needlessly inefficient. Over time, she had come to appreciate that some critiques of the Court might have been outdated, while others had not reflected a sufficient appreciation of the reasons for certain of its working methods.

14. The path from the initiation of a case to a final judgment comprised three phases: the written pleadings, the hearings, and the Court's deliberations and preparation of a judgment. Under the Statute and Rules of Court, the number of written pleadings and the time limits for each party's submissions were determined by the Court after consultation with the parties. Outsiders tended to assume that applicants before the Court wanted proceedings to move quickly towards final judgment, while respondents had an interest in delay. While that might be true in general terms, the parties' views on both the pace of the proceedings and the substance of the case inevitably evolved as the case unfolded. Applicants tended to favour a second round of written pleadings, rather than proceeding expeditiously to a hearing after one round of submissions. Both parties often requested long periods, even as long as a year, for the preparation of their respective pleadings. In addition, the written proceedings in a case were frequently interrupted by incidental proceedings. When a party filed preliminary objections to jurisdiction or admissibility, the case on the merits was suspended until the Court delivered a judgment in those proceedings. Requests for the indication of provisional measures, the filing of counter-claims and requests by third States to intervene needed to be addressed before a final judgment could be delivered. Incidental proceedings could also require the Court to postpone its work on other cases.

15. Once the written pleadings had been submitted, the Court set the date of the hearings. The Court had previously had a backlog of cases ready for hearing, which it had cleared through progressive reforms of its procedures and working methods. Although the Court had previously dealt with only one case at a time, it had become abundantly clear, well before she had joined the Court in 2010, that proceeding in that manner was a luxury the Court could no longer afford, in the light of its growing caseload. Indeed, as was obvious from the Court's report for the period from 1 August 2021 to 31 July 2022 (A/77/4), it was consistently engaged in the substantive consideration of multiple cases at any one time, in parallel with the individual and collective examination of a steady flow of procedural questions in pending cases that were not yet ready for hearing. Successive Presidents, as well as the other judges, were generally keen to schedule hearings as soon after the closure of the written phase as the particulars of the case and the workload of the Court permitted.

16. The Court had held hearings in seven cases in the period from August 2021 to July 2022. Another hearing had been held in September 2022, and the Court was planning to hold additional hearings before the end of the calendar year. In addition, it had received a number of requests for the indication of provisional measures and other incidental proceedings, all of which had proven resource-intensive. Parties also tended to submit very long written pleadings and annexes. Given the current size of its caseload and the frequency with which it was seized with complex and time-sensitive incidental proceedings, it was only thanks to the hard work and dedication of its small Registry that the Court had been able to keep abreast of its casework. The Court had been very circumspect in its budget requests and the size of its Registry had not matched the increase in its workload over recent years; given that the inflow of cases might continue to increase in the future, she questioned whether the current situation was sustainable.

17. Turning to the final stage of the work of the Court on cases submitted to it, she said that she had come to disagree with the view that its deliberations and drafting of judgments moved too slowly. After a hearing, each

judge prepared a detailed written note setting out, on a preliminary basis, his or her views on the merits of a case. That was followed by several days of deliberations and the election of a committee of judges who prepared an initial draft of the judgment. Next, written amendments were submitted by each of the plenary's judges. Two rounds of readings were then held, where successive drafts were reviewed, paragraph by paragraph, by the full Court and voted upon. Throughout its deliberations, and in all written and oral phases of its work, the Court functioned equally in its two official languages, English and French, with the attendant translation and interpretation requirements. The entire process required, on average, approximately six months, from the close of the oral hearing to the delivery of the judgment in the Great Hall of Justice.

18. The process would certainly be more efficient if the practice of circulating written notes among judges was abandoned and one judge instead drafted each judgment, with more limited opportunity for input by the other members of the Court. However, the drafting and sharing of judges' notes greatly enhanced the individual and collective appreciation of the questions to be answered in a case by the members of the Court. The written exchanges enriched subsequent in-person deliberations and improved the quality of the Court's judgments and orders. The extensive opportunities for the full Court to review the text of decisions, paragraph by paragraph and in a group, ensured not only that each judgment was carefully drafted, but also that it was truly reflective of the views of the majority on a given matter. For the International Court of Justice to be a world court not only in name, but also in fact, it was essential for all of its members to be given sufficient opportunities to exchange, debate and adjust their views based on those of their colleagues, and for each of them to be actively involved in all stages of the decision-making process.

19. **Ms. Solano Ramirez** (Colombia) said that her Government had previously appointed judges ad hoc who were not of Colombian nationality. Colombian experts in the field of international law, with few exceptions, did not speak English or French fluently enough to be able to work with their colleagues on the Court. She was interested to know what could be done by Spanish-speaking countries at the national level, and at the regional level in Latin America, to develop a group of legal experts who could work in English and French, and she also wondered whether Spanish could become an official language of the Court, in view of the large number of cases originating in Latin America.

20. **Ms. Donoghue** (President of the International Court of Justice) said that, depending on the case, there could be drawbacks or advantages to appointing a judge ad hoc who had the appointing State's nationality. Although it was sometimes difficult for a State to identify a suitable candidate from among its own nationals to serve as judge ad hoc because of language limitations, the Court could not change its official languages, as it was specified in the Statute of the Court that they were French and English. The Court's Statute, which was a part of the Charter of the United Nations, could not be changed without a change to the Charter itself. The Court did welcome diversity, however, and helped judges ad hoc on their arrival as much as possible.

21. **Mr. Abdelaziz** (Egypt) said that he would be interested to know whether developments in some cases went beyond the remit of the current Rules of Court. He was also curious to know the extent to which the Court sought to harmonize its approach to procedural aspects to account for differences between the civil law and common law traditions.

22. **Ms. Donoghue** (President of the International Court of Justice) said that the Statute of the Court was at the top of the hierarchy of the rules applicable to the Court, followed by the Rules of Court, which had been drafted by the Court itself. The Statute, which could not be changed, had been inherited from the rules drafted in 1924 for the Permanent Court of International Justice, and had held up well because it was not extensively detailed and did not restrict the Court from making adjustments when needed. The Rules of Court could be revised and updated by the Court; nonetheless, despite having examined them periodically with input from experienced counsel, the Court had left them mostly intact. The Rules of Court were a flexible instrument that allowed the Court to make adjustments on a case-by-case basis.

23. With regard to legal traditions, in her previous role as a foreign ministry lawyer negotiating treaties, the differences between civil law and common law traditions had really only had an impact in the case of discussions on matters involving domestic legal systems, such as mutual legal assistance or extradition. In the context of the Court, however, those differences did come up frequently, in particular in respect of questions that the Court addressed in its role of court of first instance.

24. When members of the Court were influenced by their traditions with regard to procedural matters or the best way to communicate a decision, for example, the Court approached such differences collectively and discussed them openly. The Court's jurisprudence over time showed that on certain settled points, its practice blended the two traditions.

25. **Ms. Maille** (Canada) said that it would be interesting to know whether the Court had considered establishing a special chamber or introducing procedural innovations to respond to the increased use of provisional measures.

26. **Ms. Donoghue** (President of the International Court of Justice) said that there had indeed been an increase in the number of requests for provisional measures received by the Court, which it had had to manage, despite some consequences for the rest of its work. Although the parties could request the formation of a chamber to deal with a particular case, and even though the outcome of a decision of a chamber carried the same weight as the decision of the full Court, parties rarely made such a request and seemed to prefer to be heard by the full Court. The Court would consider a different model if parties were to suggest one, but it was unlikely to propose one itself.

27. **Ms. Stavridi** (Greece) said that she was interested to know whether it was common for both parties to decide not to appoint judges ad hoc and whether the Court preferred that the parties rely on the existing composition of the Court.

28. **Ms. Donoghue** (President of the International Court of Justice) said that the decision to name a judge ad hoc was a matter on which each party should reach its own view. The Court welcomed judges ad hoc, whether they were appointed by one party or both, and treated them on terms of equality with its members. In her personal capacity, she had no preference one way or the other.

29. **Mr. Sarvarian** (Armenia) said that he wondered whether the Rules Committee had time to consider proposals for reform of the Court's rules of procedure and other working methods, given the Court's heavy workload. In that regard, his delegation noted with interest a recent decision of the Court in which it had instructed a party to present their arguments at the oral proceedings exclusively with regard to two questions indicated by the Court.

30. **Ms. Donoghue** (President of the International Court of Justice) said that she had been a member of the Rules Committee until being elected President of the Court. The Committee was currently chaired by Judge Tomka, a former President of the Court, and included a very capable and energetic group of judges who did an admirable job of keeping up with a significant workload alongside all the other matters before the Court. The Committee did not usually rush to a decision. Before changing its rules, it very carefully considered how a rule had come about, and its advantages and disadvantages, and also reviewed the relevant rules of procedure of other bodies. The Rules Committee usually had a substantial list of issues under consideration, which was sometimes modified when the plenary asked it to devote attention to a particular issue.

31. **The Chair**, speaking in his personal capacity, and acknowledging that the Statute of the Court could not be changed, said that he was interested to know the President's thoughts on the theoretical question of extending the competence of the Court to include international organizations.

32. **Ms. Donoghue** (President of the International Court of Justice), noting that some more modern instruments provided for the possibility that, in certain situations, competence might be transferred to a regional economic integration organization, such as the European Union, said that if the Court's Statute were ever to be opened for revision, agreement would probably be reached fairly quickly on providing for that possibility. In the meantime, international organizations did have the ability under the Court's Statute to submit written submissions in cases, but they could not be parties to a case, which limited their role.

33. **Mr. Abdelaziz** (Egypt) said that it would be useful to know more about how differences in legal cultures influenced the way in which the Court's decisions were drafted. Was there a certain uniform drafting style or did the style vary depending on the composition of the drafting committee?

34. **Ms. Donoghue** (President of the International Court of Justice) said that after the Court finished its deliberations and the President issued a summary of the provisional majority view on each of the issues in the case, the Court elected the members of a drafting committee, which was normally presided over by the President and included two judges. The initial drafting work was divided up between those two judges, with the President also closely involved. Although the drafting styles of the judges were influenced by their legal traditions, the Court itself had a number of established practices. For example, it was fastidious in setting out clearly the positions of each party before it set out the Court's reasoning. It also maintained a firm divide between the dispositive paragraph and the reasoning that led up to it. Those practices came from the civil law side. Although the personal preferences of the drafting judge could affect the style of writing used in the judgment, all judges sought to follow a form of drafting that would be broadly accepted within the Court, both in terms of the substance and the style of reasoning, since otherwise the other judges were likely to propose amendments.

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

35. **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).

36. **Mr. Ramopoulos** (Representative of the European Union, in its capacity as observer), speaking on the topic "Sea-level rise in relation to international law", said that the results of the work on legal aspects of sea-level rise to be undertaken during the forthcoming quinquennium needed to be carefully consolidated.

37. The European Union and its member States reiterated their commitment to preserving the integrity of the United Nations Convention on the Law of the Sea, which was recognized as the constitution for the oceans and had central importance in the debate, in particular as it reflected customary international law. The Convention set out the legal framework within which all activities in the oceans and seas must be carried out. Consequently, any possible responses to the challenges posed by sea-level rise that the Commission might consider needed to be in line with and respect the legal framework established by the Convention.

38. The European Union and its member States agreed with the points made in paragraphs 180 to 183 of the Commission's report (A/77/10) regarding the scope of the work of the Study Group. The Study Group should focus on the legal dimension of possible scenarios of sea-level rise and distinguish matters of policy from matters of international law, in line with the Commission's mandate of promoting the progressive development and codification of international law, notably with regard to the possible alternatives for the future concerning statehood as described in paragraph 208 of the report.

39. The Commission should exercise caution in its consideration of regional State practice and the respective *opinio juris* in the context of sea-level rise. That was because universally applicable provisions and principles, such as the United Nations Convention on the Law of the Sea, needed to be applied in a uniform way in all regions of the world and regional State practice could unjustifiably affect the rights of other States and other actors outside a particular region, for example, navigational rights and fishing rights, in the absence of an agreed reciprocal treatment. Thus, possible emerging regional State practice regarding sea-level rise should not lead to the recognition of a regional customary rule in the area of the law of the sea. The Study Group was encouraged to build on State practice and consider *opinio juris* accepted by all the regions of the world before inferring the existence or absence of an established State practice or *opinio juris*.

40. With regard to the revision and the stability of the delineation of maritime areas in connection with the effects of sea-level rise on the coastline, the principle that the land dominated the sea was an underlying premise for the attribution of maritime zones. In that regard, baselines remained the basis for the formal establishment of maritime zones under the United Nations Convention on the Law of the Sea. Sea-level rise might result in the geographical shifting of the baselines used for establishing the outer limits of maritime zones. With regard to the question of whether in such circumstances States were legally obliged to periodically review and update the charts on which straight baselines were shown, or the list of geographical coordinates of the points from which straight baselines were drawn, he noted that States were not under an express obligation to do so under the United Nations Convention on the Law of the Sea. In addition, there were significant legal and policy reasons to recognize the stability provided by the maritime delimitations established either by treaty or by adjudication.

41. **Mr. Smith** (Bahamas), speaking on behalf of the Caribbean Community (CARICOM), said that CARICOM aligned itself with the statement to be delivered on behalf of the Alliance of Small Island States (AOSIS). CARICOM commended the Commission on its work and encouraged it to continue reaching out to delegations in New York, as the legal advisers of many developing countries were not present in Geneva.

42. The topic "Sea-level rise in relation to international law" was of critical importance to the members of CARICOM, which were among the States most vulnerable to the social, economic and other effects of climate change, despite having contributed minimally to anthropogenic climate change. CARICOM could confirm first-hand that sea-level rise was likely to exhibit a strong regional pattern, with some places experiencing significant deviations of local and regional sea-level change from the global mean change. The global mean sea level would continue to rise throughout the twenty-first century, owing to climate change, and would result in increased coastal flooding, storm and hurricane surges, loss of resources, homes and lands, and loss of life in many countries in the Caribbean. Entire islands were at risk of becoming uninhabitable, as numerous projections indicated that much of their land area would become completely inundated within the next three decades. Without the support of the

international community, CARICOM was facing an apocalyptic reality.

43. CARICOM agreed with the Commission that the issue of sea-level rise was a global phenomenon that posed a threat to all Member States, with direct implications for more than one third of the international community. The repercussions facing small island developing States could no longer be ignored as a problem for future generations. Although there was no current record of situations where the territory of a State had been completely submerged or rendered uninhabitable, CARICOM agreed with the Commission's Study Group on the topic that, given the progressive character of the phenomenon, such a scenario was no longer a hypothetical concern. Low-lying and small island developing States were facing an existential threat.

44. CARICOM welcomed further study of issues previously identified by the Commission, including the legal implications of the inundation of low-lying coastal areas and islands upon their baselines, upon maritime zones extending from those baselines and upon delimitation of maritime zones; the consequences for statehood under international law should the territory and population of a State disappear or should the land be rendered uninhabitable; the displacement of persons and related questions; the preservation of the rights of States affected by that phenomenon; the right to self-determination of affected State populations; the international law protections enjoyed by persons directly affected by sea-level rise; and the question of whether the principle of international cooperation should be applied to help States cope with the adverse effects of sea-level rise on their population. CARICOM agreed with the Study Group regarding the need to examine mitigation measures for the effects of sea-level rise, including coastal reinforcement measures and construction of artificial islands, and possible alternatives for the future of statehood in the event of total inundation of a State's territory, noting that limited economies of scale and the need for human, technological and financial support, along with capacity-building efforts, made mitigation measures more challenging to implement in small island developing States.

45. States members of CARICOM were unduly suffering the consequences of a phenomenon to which they had contributed very minimally and which they had limited capacity to confront and tackle pre-emptively. CARICOM therefore supported and encouraged the Study Group's continued consideration of options such as compensation for sea-level rise and other forward-looking measures.

46. CARICOM took note of the concern expressed that the scope of the subtopics was too broad and that the Commission should reduce the number of questions under examination, by focusing on areas with sufficiently developed practice. However, doing so could mean an undesirable shift of attention away from the question of statehood, whereas all issues identified for further work remained relevant and warranted further examination and discussion, and all the main pillars of the topic had elements of codification and progressive development. CARICOM strongly encouraged the Commission to avoid unnecessarily narrowing the scope of topics in such a manner as to negatively impact the relevance and utility to Member States of the outcome. The Commission should clarify and elaborate on the envisaged outcome of the work on the topic once the Study Group had completed the preparatory work, including whether it intended to pursue further the development of the topic as a traditional topic, with a Special Rapporteur and with public debates in a plenary format.

47. CARICOM looked forward to the much-anticipated climate resolution to be presented by Vanuatu during the current session of the General Assembly, in which the Assembly was expected to request that the International Court of Justice provide an advisory opinion on the obligations of States, under international law, to safeguard the rights of present and future generations in the face of climate change and its adverse effects. While regional practice was steadily emerging and submissions of comments to the Commission were on the rise, CARICOM recognized that it had an obligation to provide input on the matter and remained committed to advancing international law in respect of the topic.

48. Turning to the topic "Protection of the environment in relation to armed conflicts", CARICOM reiterated that environmental obligations protected a collective interest and were owed to a wider group of States beyond those involved in an armed conflict or occupation. Given that international legal provisions protecting the environment during armed conflict did not always apply to national armed conflicts, the Commission should address the application of the draft principles on protection of the environment in relation to armed conflicts to non-international armed conflicts and other matters, including compensation for environmental damage and questions of responsibility and liability.

49. CARICOM commended the Commission's attention to increasing the number of women members and assisting developing States through capacity-building with the aim of enabling their more effective

participation in its work. CARICOM looked forward to discussing systemic changes aimed at supporting greater engagement between it and the Commission in the new quinquennium. CARICOM also encouraged the General Assembly to support capacity-building in developing States through a formal internship programme and looked forward to working more closely with the Commission, including through regional academic institutions and governmental outreach initiatives.

50. **Ms. Jóhannsdóttir** (Iceland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), and referring to the topic "Immunity of State officials from foreign criminal jurisdiction" said that, in the set of draft articles on immunity of State officials from foreign criminal jurisdiction adopted on first reading, the Commission had succeeded in striking a balance between the interests of the forum State and the State of the official. The procedural provisions of Part Four of the draft articles were particularly important in that regard, since they ensured adequate safeguards for the State of the official, while also observing the interests of the forum State.

51. The Nordic countries reiterated their support for draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) and their commitment to the Rome Statute of the International Criminal Court and the other treaties enumerated in the annex to the draft articles, underlining the importance of harmonizing the draft articles with those treaties.

52. The Nordic countries also expressed their support for paragraph 3 of draft article 14 (Determination of immunity), which established specific safeguards for the State of the official when the forum State was considering prosecution for one of the crimes enumerated in draft article 7. They considered that the wording of paragraph 3 succeeded in balancing the interests of the States concerned, reducing the potential for political abuse of draft article 7 without overly inhibiting its application in good faith, and they agreed with the considerations mentioned in the statement of the Chair of the Drafting Committee that safeguards specific to draft article 7 were necessary.

53. The Nordic countries supported the inclusion of draft articles 17 (Consultations) and 18 (Settlement of disputes) as a final procedural safeguard and endorsed their wording, in particular that of draft article 18, paragraph 2. They aligned themselves with the views and explanations relating to that paragraph set out on page 32 of the statement of the Chair of the Drafting Committee. However, the two draft articles were different in nature from the other draft articles in Part Four concerning procedural provisions and could merit inclusion in a separate Part Five, along with other final provisions that were standard in international conventions.

54. The Nordic countries agreed with the Commission that the draft articles could constitute the basis for negotiating a treaty on the subject, although most of them reflected customary international law and were as such already binding on States without treaty codification. The Nordic countries looked forward to hearing the views of other States on that issue.

55. Turning to the topic of "Sea-level rise in relation to international law", she said that the Nordic countries remained supportive of the Commission's work in that regard. The topic was timely, affecting the very existence of States. The Commission had rightly built its work on well-known, scientific facts, such as the conclusions of the Intergovernmental Panel on Climate Change, which had warned that only the most drastic cuts in carbon emissions would help prevent an environmental disaster.

56. Small island developing States were particularly vulnerable to the consequences of sea-level rise. Close to 700 million people lived in low-lying coastal zones, a number projected to reach more than one billion by 2050, and those zones would suffer a significant increase in risks related to sea-level rise, such as erosion, flooding and salinization. According to the Intergovernmental Panel, increases in tropical cyclone winds and rainfall and in extreme waves, combined with sea-level rise, would exacerbate extreme sea-level events and coastal hazards. Those developments were a matter of concern to all States, not just those which would suffer most from the consequences and which in many cases had done least to cause them.

57. The subtopics covered by the second issues paper prepared by the Co-Chairs of the Study Group on the topic (A/CN.4/752 and A/CN.4/752/Add.1), relating to statehood and to the protection of persons affected by sea-level rise, were relevant and should be explored further by the Commission. The Nordic countries agreed that questions of statehood were sensitive and should be addressed cautiously. While it was possible that only relatively few small States would become submerged or uninhabitable due to sea-level rise, an existential threat to one State needed to be considered a threat to the international community as a whole. The Commission's report (A/77/10) touched upon possible alternatives for the future in relation to statehood. That discussion was necessary since, as the Co-Chair had pointed out, although there was no record of situations where the

territory of a State had been completely submerged or rendered uninhabitable, such a situation could not be considered a distant theoretical concern. According to the Intergovernmental Panel, sea levels were certain to keep rising well beyond 2100, although the magnitude and rate would depend on how fast emissions were reduced. The situation was in many ways unprecedented from the point of view of international law.

58. State practice was essential to the Commission's work, but in its absence for large parts of the world – and with a clear distinction being made between legal and policy aspects – the Commission could assist the international community by reflecting on the basis of international law and generating a dialogue on the possible options and alternatives for States to consider in dealing with the problems associated with sea-level rise. In that regard, although aspects of the law of the sea were addressed separately from the two subtopics currently under discussion, the Nordic countries reiterated their long-standing position on the need to fully preserve the integrity of the United Nations Convention on the Law of the Sea.

59. As noted by the Co-Chair of the Study Group, once a State was created under international law, it had an inalienable right to take measures to remain a State. That assumption, based mainly on the 1933 Convention on Rights and Duties of States, with its qualifications for what constituted a State, namely a permanent population; a defined territory; a Government; and a capacity to enter into relations with other States, and also supported by examples from regional legal instruments, was fundamental to the issue at hand, and while it could be agreed to in principle, it would be helpful if the Commission could explore it further. The same applied to the presumption of continuity of statehood, for example in the absence of a territory. In that regard, it was relevant to discuss the capacity of such a State to uphold its obligations, including under human rights, migration and refugee law and in relation to its maritime zones.

60. With regard to the protection of persons affected by sea-level rise, the Nordic countries had taken note of the comment by the Co-Chair that existing legal frameworks potentially applicable in that regard were fragmented and general in nature and could therefore be further developed. While it was too early to come to conclusions on whether a specific legal framework was needed, it would be useful if the Commission could examine that issue further. The Nordic countries were pleased that the Co-Chair intended to follow emerging and existing practice closely and to establish and maintain contacts with a range of relevant expert bodies and international organizations. Among the points listed by the Co-Chair for further examination were the protection of persons in vulnerable situations and the prevention of statelessness, which were issues of the utmost importance.

61. With regard to the applicability of human rights law to the topic, it was clear that some international human rights were inalienable. Furthermore, as set forth by the World Conference on Human Rights, in the 1993 Vienna Declaration and Programme of Action, all human rights were universal, interrelated, interdependent and indivisible, an assertion that might, for instance, apply to the cultural rights of persons whose State had been inundated or rendered uninhabitable. The question of the human rights of such persons was important and required thorough consideration from the perspective of international law.

62. The Commission was well placed to assist States in clarifying and systematizing international law relating to sea-level rise and in identifying needs for new regulations that States might address in responding to the multitude of problems caused by sea-level rise. In that connection, it was important to distinguish between the legal and political aspects of addressing climate change. The Nordic countries were committed to urgent climate action and looked forward to engaging further with the Commission on the important topic under consideration.

63. **Ms. Hong** (Singapore) said that the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction" continued to be of significant interest to her delegation, because it touched on practical aspects of international relations among States. Procedural safeguards were important to ensure that the immunity of State officials, where applicable, was respected in the interests of stability of international relations and the sovereign equality of States. At the same time, a margin of appreciation and flexibility must be accorded to States when addressing such matters to respond to the realities of the circumstances in which law enforcement measures might have to be applied.

64. Her delegation appreciated the fact that a number of the suggestions it had made in its statement before the Committee at the seventy-sixth session of the General Assembly (A/C.6/76/SR.20) had been taken on board, relating to immunity before international criminal tribunals, currently reflected in draft article 1, paragraph 3; the obligation to examine immunity when the forum State became aware that the relevant individual might be an official whose immunity might be affected, currently reflected in draft article 9; and the settlement of disputes, currently reflected in draft article 18. It reiterated its view that the Commission should clarify in

the commentaries that the obligation in draft article 9, paragraph 2, did not preclude a State from taking necessary and proportionate measures to prevent harm in response to an imminent and unlawful use of force. The same comment applied to draft article 10, paragraph 1, concerning the obligation for the competent authorities of the forum State to notify the State of a foreign official before taking coercive measures affecting that official. Her delegation's previous comments along those lines had yet to be reflected in the draft articles and commentaries.

65. On the topic "Sea-level rise in relation to international law", Singapore, a small island developing State, underlined the very real and existential threat posed by that phenomenon. On the subtopic of statehood covered by the second issues paper prepared by the Co-Chairs of the Study Group on the topic (A/CN.4/752 and A/CN.4/752/Add.1), it supported the view expressed by members of the Study Group that there was a difference between criteria for the creation of a State and those for its continued existence. That said, the issue and its implications required closer examination. In particular, Singapore acknowledged that the prolonged or permanent loss of territory would, as a practical matter, almost inevitably affect the capacity of a State to exercise its rights and fulfil its obligations under international law, and it appreciated the Study Group's efforts to identify and explore various modalities by which a State might continue to preserve or maintain some territory. It would be useful to examine the practical options that might be considered by vulnerable States whose existence was threatened by rising sea-levels, and also their potential legal implications and consequences.

66. On the subtopic of protection of persons affected by sea-level rise, her delegation commended the extensive work of the Co-Chair in identifying the patchwork of legal frameworks and soft-law instruments that could apply to such persons in different scenarios and to varying degrees. It agreed with her that additional study was required with a view to evaluating the applicability of those different frameworks, instruments and principles in the context of sea-level rise. The proposal to consider matters of protection of persons in situ and in displacement separately might be a sensible way forward.

67. Her delegation had taken note of the Study Group'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 substantive report in 2025. It had suggested that the examination of practical options for vulnerable States would be a useful outcome, and it noted that different outcomes might be appropriate or useful, depending on the subtopic in question. It looked forward to further progress of the Commission's work as soon as possible.

68. **Mr. Marciniak** (Poland), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that his delegation appreciated the Special Rapporteur's effort to craft a set of draft articles that struck an optimal balance between immunities-related law, which was rooted in the principle of sovereign equality, and the need to combat impunity for the most heinous crimes under international law.

69. It was the understanding of his delegation that the draft articles concerned primary norms of international law and were without prejudice to applicable secondary norms, in particular circumstances precluding wrongfulness. Thus, in its view, when the prerequisites of circumstances precluding wrongfulness were fulfilled, States could invoke them in relation to obligations concerning immunities of foreign officials.

70. With regard to the list of crimes in respect of which immunity did not apply, as set out in draft article 7, Poland had doubts about the appropriateness of omitting the crime of aggression. The Commission had justified that decision with two arguments: the requirement that national courts would have to determine the existence of a prior act of aggression by the foreign State; and the special political dimension of that type of crime, because it was committed by political leaders. However, it should be borne in mind that, to a large extent, the same arguments could be applied to crimes against humanity, genocide and war crimes. It was difficult to imagine that domestic courts could rule on the responsibility of representatives of foreign States accused of having committed one of those crimes without directly or indirectly addressing the issue of the responsibility of the foreign State. With respect to the Commission's second argument, the fact that a representative of another State had committed a crime obviously had significant political implications. Both current and historical practice involving disputes between States clearly indicated that genocide, crimes against humanity and war crimes all had a political dimension comparable to that of the crime of aggression. Furthermore, from a systemic perspective, omitting the crime of aggression from draft article 7 would appear to exclude the right of States that fell victim to aggression to exercise jurisdiction over individuals who had committed that crime against them, even when those persons were not protected by immunity *ratione personae*.

71. Turning to the topic "Sea-level rise in relation to international law", his delegation reiterated the point made in 2021 that, as the topic could have practical implications for State practice, the Commission should make a clear distinction between *lex lata*, *lex ferenda* and policy options, because the study could encompass considerations which potentially went well beyond the traditional dichotomy of codification and progressive development. That was particularly visible in the context of continuity of statehood in situations where a State's territory suffered total inundation, until now a completely unprecedented circumstance for which there was no State practice. The historical precedents of temporary loss of control over State territory were not comparable, as they had not been caused by natural processes and had not had a permanent character. Simply declaring that a State continued to exist, even when its territory was totally and permanently submerged, could not suffice without some explanation of the State's future modus operandi and without requiring other States to accept some sort of territorial or functional limitations on their own sovereignty. That question could therefore require an examination of the outer limits of the Commission's mandate to promote the progressive development of international law.

72. The Commission should also consider whether the topic's extraordinary breadth lent itself to uniform treatment. That was clearly reflected in the State practice that could be used as a point of reference. While such practice could to some extent be identified with regard to the law of the sea and perhaps also the protection of persons affected by sea-level rise, the situation was completely different when it came to the total inundation of a State's territory. The Commission should therefore consider dividing the treatment of the subject, inter alia because the subtopics on the law of the sea and protection of persons seemed much more pertinent and demanded a more urgent response than the subtopic on statehood.

73. **Mr. Rakovec** (Slovenia), speaking on the topic "Immunity of State officials from foreign criminal jurisdiction", said that that the subject was complex and sensitive, touching upon the need to respect the principle of sovereign equality of States and their functioning, particularly in relation to international cooperation, on the one hand, and the principle of accountability and the fight against impunity, on the other. Immunity was not absolute; it had its limitations. The question was where and how those two sets of principles could interact to ensure coexistence, mutual respect and human rights. A proper balance needed to be found in the substantive draft articles on the topic to allow for the exercise of criminal jurisdiction and the invocation of the individual criminal responsibility of officials of another State in certain cases or under certain conditions while providing the necessary safeguards for international cooperation. A proper administration of justice and a mechanism for settlement of disputes were of crucial importance in that regard.

74. As to crimes under international law in respect of which immunity *ratione materiae* would not apply, his delegation supported the inclusion of draft article 7. It was not the gravity of the acts that demanded the exception, it was the core values of the international community that needed to be protected. However, his delegation noted that, while the Commission had not included the crime of aggression in the list of crimes under international law in respect of which immunity *ratione materiae* would not apply, the prohibition of aggression had been included in the non-exhaustive list of norms found in the annex to the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), meaning that it reflected the common and overarching values shared by the international community as a whole. The Commission should therefore give further consideration to including the crime of aggression in draft article 7. His delegation also saw merit in examining the criteria supporting the inclusion of crimes under international law in the list beyond the exclusive criteria of an existing treaty.

75. Regarding draft article 13 (Requests for information), a broader approach to sources, and the inclusion of temporal elements, would merit consideration.

76. Turning to the topic "Sea-level rise in relation to international law", he said that sea-level rise was one of the most significant direct consequences of global warming, and its rate was accelerating. As noted by the Co-Chair of the Study Group on the topic, sea- level rise would disproportionately affect low-lying coastal countries and small island developing States, in some cases threatening their survival. To provide protection to those most adversely affected, a commitment to solidarity and enhanced, coordinated and collaborative international cooperation were urgently needed.

77. The effects and implications of sea-level rise precipitated complex and sometimes completely novel situations that revealed the gaps in and fragmentation of the applicable legal framework. That was illustrated in the second issues paper on the topic (A/CN.4/752 and A/CN.4/752/Add.1), in relation to the subtopic on protection of persons affected by sea-level rise. The Commission's future work on the subject would be instrumental in addressing those gaps and would require

further examination of principles that could be applicable to the protection of persons affected by sea-level rise, especially those relating to the protection of human dignity and to international cooperation. It was important to address thoroughly the unprecedented effects of climate change, since the territories of some populations would very likely become permanently uninhabitable for the foreseeable future. Answers must be found to the questions regarding the status of those populations and how to protect their human rights and fundamental values.

78. Slovenia appreciated the Commission's integrated approach to the topic, which sought to address the interconnectedness of the various legal issues arising from the impact of sea-level rise. It appreciated the wide and varied outreach efforts of the Co-Chairs of the Study Group on the topic and looked forward to the Commission's further work on that pressing issue.

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

80. **Mr. Jia** Guide (China), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that, with regard to the newly adopted draft article 18 (Settlement of disputes), generally speaking it would only be relevant to provide for dispute settlement if the draft articles were intended to become a treaty. His delegation had a number of comments on draft article 18, without prejudice to whether or not the draft articles were to be used as a basis for the negotiation of a future treaty. His delegation appreciated the provision contained in paragraph 1 of the draft article, according to which the forum State and the State of the official could seek a solution to their dispute by negotiation or other peaceful means of their own choice, and believed that it was the most effective means of dispute settlement. Its inclusion in the draft articles would help encourage such practice. With regard to the provision in paragraph 2 that, if a mutually acceptable solution could not be reached within a reasonable time, the dispute would, at the request of either the forum State or the State of the official, be submitted to the International Court of Justice or another dispute settlement mechanism, his delegation noted that, in accordance with the principle of State consent, States had the right to decide whether or not to accept compulsory third-party dispute settlement. The Commission should therefore either delete paragraph 2 or add a provision allowing States to formulate a reservation thereto.

81. The whole set of draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading was fundamentally flawed owing to the inclusion of draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), the content of which was based on the domestic law of only a few States and the Rome Statute of the International Criminal Court. Evidence in support of that draft article was therefore insufficient, and that could open the way to excessive politicized prosecutions, which in turn could affect the normal performance of the functions of officials in foreign States. Furthermore, the fact that draft article 7 had not been adopted by consensus showed that considerable disagreement persisted, even within the Commission. The Commission's failure to specify the criteria for determining the listed exceptions to immunity further undermined the credibility of its work on the topic. The Commission should replace the list of specific exceptions with the phrase "the most serious crimes under international law" and, following thorough discussions, clarify the criteria for exceptions to immunity *ratione materiae* so that the outcome of its work would reflect a consensus among all parties.

82. Turning to the topic "Sea-level rise in relation to international law", he said that, since sea-level rise concerned issues of international law in many fields and relevant State practice was still evolving, the Commission should recognize the complexity of the subject and focus on improving its working methods. The Commission had made it clear that it would not propose modifications to existing international law on the subject, such as the United Nations Convention on the Law of the Sea, and it had listed specific issues regarding the law of the sea to be addressed, including possible legal effects of sea-level rise on the baselines and outer limits of maritime spaces measured from the baselines, maritime delimitations and the role of islands in the construction of baselines and in maritime delimitations. Those issues involved both interpretation of the Convention and the vital interests of coastal States and were therefore highly complex and sensitive. They should be dealt with cautiously to avoid political disputes, fragmentation or even conflicting rules. However, in order to arrive at the broadest possible consensus, future consideration of the topic should not be limited to closed-door meetings of the Study Group.

83. Concerning the topic "Succession of States in respect of State responsibility", his delegation agreed with the Commission's approach not to introduce separate provisions on a plurality of successor States and with the conclusion that relevant issues could be resolved on the basis of the general rules of State responsibility. During the Sixth Committee's deliberations on the topic at the seventy-sixth session of the General Assembly, a number of delegations,

including his own, had suggested that the outcome of work be draft guidelines instead of draft articles, or else an analytical report. China appreciated the decision of the Commission to adopt that suggestion and hoped that it would provide further details on how it would reformulate the former draft articles into draft guidelines. For example, background information could be added to the commentaries regarding the formation of new States following the dissolution of a State and other circumstances. That would enable the Commission to strike a balance between the "clean slate" principle and the "automatic succession" position. Under the "clean slate" principle, newly independent States did not take on the treaty obligations of the predecessor States.

84. On the topic "General principles of law", referring to the draft conclusions provisionally adopted by the Drafting Committee, China agreed that to determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems was required, as stated in draft conclusion 5. However, it should be made clear in the commentary that legal principles recognized by only a few States or groups of States were not common principles.

85. With regard to draft conclusion 6 (Determination of transposition to the international legal system), China stressed that the sources of principles of domestic law and rules of international law were completely different. Strict criteria were required to determine the transposition of a principle of domestic law to the international legal system, and the principle must be universally recognized by the international community. Moreover, a principle expressed in the same way might have different connotations under domestic and international legal systems. Therefore, the Commission should avoid using concepts unique to the domestic legal systems of certain States when setting out norms for the interpretation of transposition of general principles of law.

86. Concerning draft conclusion 3 (Categories of general principles of law), provisionally adopted by the Commission, his delegation was of the view that the existence of general principles of law formed within the international legal system, as referred to in subparagraph (b), lacked sufficient theoretical and practical support. For example, the Martens Clause cited by the Special Rapporteur in his first and second reports (A/CN.4/732, and A/CN.4/741 and A/CN.4/741/Add.1), was generally regarded as customary international law in the field of international humanitarian law rather than a general principle of law.

87. On draft conclusion 7 (Identification of general principles of law formed within the international legal system), provisionally adopted by the Drafting Committee, which was closely related to draft conclusion 3 (b), his delegation noted that paragraph 1 addressed the threshold for determining the existence and content of a general principle of law that might be formed within the international legal system, and paragraph 2 specified that paragraph 1 was without prejudice to the possible existence of other such principles. The Commission should consider reversing the order of the two paragraphs.

88. **Ms. Sekhar** (India), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said that her delegation appreciated the efforts of the Commission with regard to the draft articles, aimed at promoting trust, mutual understanding and cooperation based on good faith between the forum State and the State of the official and offering safeguards against possible abuses and politicization in the exercise of criminal jurisdiction over an official of another State. It was important to guarantee respect for the principle of the sovereign equality of States, which was the foundation of the immunity of State officials from foreign criminal jurisdiction. The topic was complex and politically sensitive, as it was directly related to the actions of State officials abroad. Its consideration required a balanced approach, taking into account existing laws and practices on related issues. In that connection, India called for an in-depth examination of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, in which the Court had identified State practice in respect of immunities before national jurisdictions and had affirmed that immunities accorded to State officials were not granted for their personal benefit, but to protect the rights and interests of the State.

89. The status and nature of the duties of persons claiming immunity was a factor of core importance. There could be a situation where a State official undertook a contractual assignment other than or in addition to his or her official duties. In such a situation, factors such as the status of the official, the nature of the official's functions, the gravity of the offence, international law on immunity, the victim's interests and all related circumstances should be taken into account in determining immunity.

90. Her delegation took note of the divergent views of States on draft article 7, pursuant to which immunity *ratione materiae* from the exercise of foreign criminal jurisdiction would not apply in respect of the crimes under international law listed therein, in line with

certain international conventions, including the Rome Statute of the International Criminal Court. The views of all members of the Commission should be taken into account in an attempt to achieve a consensus on draft article 7 before its adoption on second reading. Her delegation reaffirmed the views it had expressed in its statement before the Committee at the seventy-sixth session of the General Assembly (A/C.6/76/SR.23) concerning the Commission's need to find a solution that reconciled the divergent views of the Committee's members and other stakeholders. Any system, if not agreed, would likely cause harm to inter-State relations and undermine the objective of ending impunity for the most serious international crimes. At the same time, her delegation reiterated that the provisions under consideration should not be viewed as codifying existing international law in any manner. It would prefer issues of immunity to be examined independently without reference to the Rome Statute, to which several countries were not parties.

91. With regard to the topic "Sea-level rise in relation to international law", India was aware of the impact of sea-level rise and the immense challenge of understanding the associated complex legal and technical issues without losing sight of their human dimension. The legal implications of that phenomenon would become evident at the national, regional and international levels, and the potential impact on statehood, maritime zones and human rights needed to be examined in more detail. The issue posed disproportionate challenges for the social and economic development of small island developing States, given their size, remote location, vulnerability, and high energy and transport costs. The territories of those States and the maritime zones allocated under the United Nations Convention on the Law of the Sea were central to their statehood, economies, food security, health, education, cultures and livelihoods. The work of the Commission was therefore particularly important to such countries. Reducing their vulnerability and strengthening their resilience to climate change should be a collective responsibility of the international community.

92. The Commission should focus on the legal dimensions of sea-level rise and should consider recommendations only after in-depth study of the relevant principles and sources. Her delegation looked forward to further discussion in the Commission on the topic, with due regard for the integrity of the United Nations Convention on the Law of the Sea.

93. On the topic "Succession of States in respect of State responsibility", her delegation took note of the draft articles proposed by the Special Rapporteur in his fifth report (A/CN.4/751), in particular draft article 2 (e) [(f)] containing a definition of "States concerned", draft article 4 [6] (No effect upon attribution), draft article 6 [7 bis] (Composite acts) and draft article 8 [X] (Scope of Part II), as well as the entirety of Part Three and Part Four.

94. Concerning the conclusion drawn by the Special Rapporteur on the issue of plurality of States involved in continuing or composite acts, the Drafting Committee needed to further examine questions relating to shared responsibility when a predecessor State continued to exist and also when the obligation of cessation applied in the case of a composite act or a continuing act which occurred during the succession process.

95. Her delegation agreed with the Special Rapporteur's view regarding the subsidiary nature of the draft articles and that priority was to be given to agreements between the States concerned. However, geographically diverse sources of State practice should be taken into consideration and highlighted so as to make clear the relationship between State practice and each provision. That would clarify which ones were supported by State practice and which constituted progressive development of international law. Her delegation noted that the draft articles previously referred to the Drafting Committee would be reformulated as draft guidelines, as many members of the Commission, as well as Member States, had expressed doubt about the form of the outcome.

96. On the topic "General principles of law", her delegation stressed that a careful approach must be taken with regard to the sources of international law. It agreed that the Commission's work on the topic should be based on Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, including State practice and jurisprudence, and it endorsed the view that there was no hierarchy among the three principal sources of international law as identified in Article 38, paragraph 1, thereof. Accordingly, general principles of law should not be described as a subsidiary or secondary source of international law; instead, the term "supplementary source" could be used.

97. Her delegation appreciated the Special Rapporteur's view that the compatibility test should be in relation to norms that were universally accepted and that could be considered as a reflection of the basic structure of the international legal system. However, after addressing the functions of general principles of law, the Commission should consider introducing a definition of general principles of law to clarify the scope of its work.

98. Her delegation reiterated its view that an analysis should be conducted in two steps: the determination that a principle was common to the principal legal systems of the world, and the ascertainment of the transposition of said principle to the international legal system.

99. India looked forward to future work on the question of the functions of general principles of law as a source of international law and their relationship with other sources of international law; the manner or method of their identification and transposition; and their role in certain circumstances for interpretation or gap-filling.

100. **Mr. Zanini** (Italy), referring to the topic "Immunity of State officials from foreign criminal jurisdiction", said his delegation hoped that the eventual adoption of a set of draft articles would lead to the elaboration of a convention that would address the problem of the fragmentation of national practices on the issue. It reiterated its support for draft article 7, which provided for an exception to functional immunity in respect of crimes under international law. His Government was considering the inclusion of a similar rule in its national code of international crimes, which was in the process of being drafted.

101. With regard to the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading, his delegation was pleased that the "without prejudice" clause concerning international criminal courts and tribunals had been moved to paragraph 3 of draft article 1 (Scope of the present draft articles). However, with regard to the reformulated wording of the provision, the exclusive reference to international criminal courts and tribunals established by treaty might unintentionally narrow its scope.

102. Italy welcomed the adoption on first reading of draft article 14 (Determination of immunity), which was a key provision among the procedural provisions and safeguards contained in Part Four. However, regarding the moment at which immunity should be determined, his delegation had reservations about the use of the phrase "before initiating criminal proceedings", which was also used in draft article 9 (Examination of immunity by the forum State). While his delegation recognized that the examination of immunity began before the initiation of criminal proceedings, it believed that the determination of immunity, in particular in relation to immunity *ratione materiae*, required a preliminary search for evidence. It therefore recommended that a different phrase be used in draft article 14, paragraph 4 (a), setting a later time limit for the determination of immunity, such as before the commencement of trial.

103. His delegation welcomed the wording of draft article 11 (Invocation of immunity), especially paragraph 2 thereof, which clearly stated that such invocation must be in writing. With regard to draft article 10 (Notification to the State of the official), Italy was of the view that notification by the forum State should likewise be made in writing, especially since such notification was mentioned in draft article 14 as a significant element for the determination of immunity.

104. His delegation welcomed the inclusion of a dispute settlement clause in the draft articles, especially given that it would be desirable to elaborate a convention on the basis of the draft articles in the future. However, it would be useful to clarify in draft article 18 (Settlement of disputes) that disputes could arise only after the competent judicial authority of the forum State had made its determination on the question of immunity.

105. On the topic "Sea-level rise in relation to international law", Italy recognized the importance and the urgency of addressing the issue, mainly because of the dramatic consequences that several States, in particular small island developing States, were facing and would face in the future due to that phenomenon. However, the Commission's work on the subject should not undermine the legal framework enshrined in the United Nations Convention on the Law of the Sea.

106. With regard to the subtopic of statehood, his delegation agreed with the proposal made in the Study Group on the topic regarding the need to differentiate between cases where the territory of a State was completely submerged and cases where a State had become uninhabitable due to a partial reduction of its territory as a consequence of sea-level rise. Due consideration should also be given to the effects on statehood of phenomena such as periodic flooding and freshwater contamination caused by rising sea levels. The Study Group should consider whether and to what extent States affected by sea-level rise could invoke a state of necessity.

107. On the subtopic of protection of persons affected by sea-level rise, Italy encouraged further research on the applicability of and possible consequences for human rights law, refugee and migration law, and disaster and climate change law in addressing the challenges arising from sea-level rise.

108. As to the final outcome of work on the topic, Italy was in favour of the proposal made in the Study Group for the elaboration of a draft treaty on a new form of subsidiary protection for persons affected by sea-level rise.

109. **Ms. Flores Soto** (El Salvador), 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 reflected a balance between the principle of the sovereign equality of States, which was the very foundation of such immunity, and the right of the forum State to exercise its criminal jurisdiction; that would help prevent tensions between the forum State and the State of the official and thus contribute to stability in international relations.

110. Her delegation stressed the importance of the clarification in paragraph 3 of draft article 1 (Scope of the present draft articles) that the draft articles did not affect the regime applicable with regard to international criminal courts and tribunals. Similarly, paragraph 2 clarified that the draft articles were without prejudice to the immunity from criminal jurisdiction enjoyed under well-established special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State. Immunity did not and could not be interpreted as impunity, a point reflected in the development of the Commission's work on the topic and, in particular, in draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply). In the view of her delegation, it was appropriate that the proposed list of international treaties referred to in draft article 7 should be placed in the annex to the draft articles on a strictly illustrative basis, since not all States were parties to all the treaties enumerated therein.

111. Her delegation endorsed the point made in draft article 12 that waiver of immunity must always be express, because that was in line with other international instruments on which there was a high degree of consensus, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. El Salvador awaited with anticipation the recommendation that the Commission would address to the General Assembly.

112. On the topic "Sea-level rise in relation to international law", her delegation reiterated that sea-level rise should be recognized by the Commission as a scientifically proven fact, the implications of which were not limited to the law of the sea but extended to a wide range of other international law disciplines – including international environmental law and international human rights law, with an emphasis on the need to protect populations displaced by sea-level rise – that converged in a multidimensional analysis of the phenomenon and should be addressed by the Commission. Her delegation was pleased that the second issues paper (A/CN.4/752 and A/CN.4/752/Add.1), prepared by the Co-Chairs of the Study Group, reflected that multidimensional approach. Her delegation was grateful to the Co-Chairs for their important work, which was clearly part of the Commission's task of progressive development of international law.

113. El Salvador recognized that sea-level rise was one of the effects of climate change and global warming, which had a different impact in different regions. It shared the assessment of the Co-Chairs that the phenomenon was not uniform and presented a particular risk for small developing States. It was important to hold regular consultations with the scientific community, in particular the Intergovernmental Panel on Climate Change.

114. The protection of human dignity was central to all applicable initiatives, policies and norms, and the Study Group should therefore place particular emphasis on the protection of persons affected by sea-level rise in its work on the topic. In that regard, the reference by Candado Trindade to universal juridical conscience in the process of humanization of contemporary international law was an important perspective from which to consider the topic. The protection of human dignity was a universal obligation that went beyond matters relating to the law of the sea and the consideration of jurisdictional maritime zones. International cooperation would be crucial to maintain that human focus.

115. On the sources of law, her delegation reiterated its concern about the central role that the Commission wanted to attribute to the United Nations Convention on the Law of the Sea. It was important to bear in mind the multidimensional approach that the topic warranted and to take into account the relevance and applicability of other international legal instruments, for example those referred to in paragraph 191 of the Commission's report (A/77/10).

116. As for statehood in relation to sea-level rise, important precedents could be set, including the recognition of de jure statehood. However, when examining the question, it was important to bear in mind the presumption of continuity of the State, for which sufficient information on State practice was required, and the right to self-determination of the affected population.

117. **Mr. Popkov** (Belarus), 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 could serve

as a good basis for the continued development by States of key approaches to the regulation of legal relations in the area.

118. Recognition of the immunity of State officials was not for their personal benefit, but to create the legal conditions for the exercise of the sovereign rights of the States they represented in domestic and foreign affairs. Immunity of State officials was an extension of the immunity of States and was objectively needed to ensure the ability of States to take part in international affairs. If that rule of international law were to be undermined, conflicts between States might occur much more often, which would have an adverse impact on international cooperation in addressing new challenges and threats.

119. The codification and progressive development of rules concerning the immunity of State officials from foreign criminal jurisdiction must ensure that the punishment of perpetrators of grave international crimes committed in foreign jurisdictions did not conflict with the principles of the sovereign equality of States and non-interference in their internal affairs. His delegation welcomed the Commission's efforts to build confidence and promote mutual understanding between States by ensuring that the draft articles provided for the detailed regulation of procedural aspects for determining the immunity of State officials and included strong guarantees for their fair treatment. Those norms would have even greater weight if the Commission put a greater emphasis in the draft articles on the presumption of immunity of State officials prior to the initiation of criminal proceedings. In all situations regulated in the draft articles, including the transmission of information by the State of the official in response to notification by a foreign State of its intention to prosecute one of the said State's officials, the focus should be on confirming the existence of immunity of the State official and determining whether it continued to apply in certain circumstances, and not on the invocation of immunity from foreign criminal jurisdiction.

120. Draft article 14 (Determination of immunity) gave the authorities of the forum State rather broad discretion in making the determination of immunity. His delegation was of the view that the express waiver of immunity by the State of the official must be the primary basis for instituting criminal proceedings or taking coercive measures against an official of another State. The judicial authorities of the forum State could play a different role in the case of the exceptions to immunity of State officials set out in draft article 7, provided that such exceptions enjoyed sufficiently broad support by States to become a customary rule of international law. However, national and international jurisprudence regarding limitations on the immunity of State officials from foreign criminal jurisdiction lacked uniformity. Each of the well-known examples in national case law addressed a complex set of questions on State immunity and the immunity of State officials, and the related court decisions were subject to numerous challenges and reviews in higher courts. The issue of limitations on the immunity of State officials from foreign criminal jurisdiction was controversial and was likely to give rise to an atmosphere of instability and tension in international relations, hence the need for a cautious approach.

121. Concerning exceptions to immunity of State officials charged with crimes under international law, his delegation suggested that the Commission might consider addressing in greater detail the right of State officials to challenge court decisions determining that they did not enjoy immunity, as set out in draft article 14, paragraph 5. That would be particularly useful if the criminal proceedings in the forum State could proceed in the absence of the State officials and if the forum State took coercive measures that affected the right of foreign State officials to swift and adequate legal assistance. Such persons might not have access to the legal assistance of their State while located outside the borders of their State. A clarification in draft article 14, paragraph 5, would be fully in line with draft article 16 (Fair treatment of the State official). Moreover, given that in cases of non-recognition of immunity the rights and lawful interests of the State of the official might be infringed, the Commission should make provision in draft article 18 for a special mechanism for the settlement of disputes through conciliation and other procedures involving a neutral third party.

122. To ensure a proper understanding and application of the draft articles, the Commission should clarify, in draft article 2 (Definitions), what was meant by the phrase "act performed in an official capacity". The phrase "in the exercise of State authority", used to describe acts performed by officials in their official capacity, was not sufficiently clear and was open to differing interpretations in the legal systems of States. It should therefore be clarified in the draft article itself, so as to ensure that the official participation of State officials in the exercise of the State's core legislative, executive and law enforcement activities was covered as broadly as possible.

123. His delegation was mindful of the complexities of the topic, given the vagueness of international custom and State and international jurisprudence, in particular with regard to the definition of the scope of immunity *ratione personae*. It reiterated its view that, in its consideration of contentious issues, the Commission

should seek out legal frameworks that ensured the stability of international relations and respect for State sovereignty. Given the active involvement of senior State officials in conducting the foreign affairs of their State and developing international cooperation in the current environment, such officials must enjoy immunity *ratione personae*. The criterion for such immunity should be the attribution to senior State officials – in particular members of Government – of State functions in the political, economic, defence and other spheres, the exercise of which was of critical importance for the State's sovereignty and security and the promotion of international cooperation. The draft articles should also reflect the understanding that immunity *ratione personae* continued to be recognized for the so-called "troika" (Heads of State, Heads of Government and Ministers for Foreign Affairs) in respect of acts performed while they were in office after they left office. Any other approach did not reflect the full content and objectives of immunity *ratione personae*. It was not impossible that immunity *ratione materiae* might be manipulated in order to prosecute State officials for their activities or convictions while in office for purely political motives or to put pressure on the sovereign States that they represented. Where there were cogent grounds for instituting criminal proceedings, decisions on all questions depended on the waiver of immunity by the State of the official for that category of official.

124. His delegation shared the view expressed by other Member States that, after further revision, the Commission should resubmit the draft articles to States for their consideration, prior to taking a decision on their final form.

125. Belarus supported consideration of the topic "Sea-level rise in relation to international law" and was aware of the importance of the issue for numerous small island and coastal States, many of which were developing countries. The subject called for an in-depth study that focused not only on the impact of the phenomenon on statehood, the preservation of identity and the protection of the rights of many population groups, but also on action to prevent sea-level rise, which was due in large measure to the state of the environment. It was essential to elaborate an international legal document with a set of measures for protecting the interests of the populations of flood-prone territories, assisting them and providing for the potential participation of the international community in restoring the natural environment and mitigating the impact of sea-level rise in the most affected States.

The meeting rose at 12.55 p.m.