



Statement on behalf of The Kingdom of the Netherlands

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United Nations

on

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Report of the International Law Commission

Cluster 3

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Mr Chairman, on behalf of the Kingdom of the Netherlands, I would like to thank you for the overview you have just provided of the work of the Commission for this cluster of topics. In what follows, I will present to you the comments and observations my government has with respect to these topics.

Chapter IX (Protection of the environment in relation to armed conflicts)

My government would like to thank the Commission for its work on this topic and the Special Rapporteur for her first report and provide comments on the newly proposed draft principles on occupation.

We agree with the Special Rapporteur that the law of occupation should be placed in a fourth section of the draft principles. We also support the suggestion made by members of the Commission to include a separate draft article stating that Parts One, Two and Three apply *mutatis mutandis* to situations of occupation.

On draft principle 19, my government agrees with the Special Rapporteur that a progressive interpretation of Article 43 of the 1907 Hague Regulations, especially taking into account the French version of the text, and given the view that the protection of the environment is part of the core functions of a modern State, would include the protection of the environment. We note with support that elements on criminal law of Article 64 of the Fourth Geneva Convention have been included in the proposal by the Drafting Committee.

Concerning paragraph two of draft principle 19, we support the inclusion of the reference to health. We do, however, agree with members of the Commission who asked the Special Rapporteur to extend her analysis to include other human rights, such as the right to life, the right to water and the right to food, but would like to caution that the scope of the research should remain manageable.

On draft principle 20, we agree with the Special Rapporteur that, in relation to the environment, a modern-day interpretation of 'usufruct' as mentioned in Article 55 of the 1907 Hague Regulations would include the 'sustainable use' of resources. There should be a balance between environmental harm caused by, for example, the use of non-renewable resources against the need of society, and future generations to use natural resources and ecosystem services for public welfare. In this respect, we would like to recall the Commission's observations on intergenerational equity with respect to the use of non-renewable natural resources, in particular to ensure the maximization of the long-term benefits of such use. My government is of the view that the suggestion made by the Drafting Committee is an improvement since it includes the permission the occupying power has to administer and use the natural resources under certain conditions.

On draft principle 21, my government supports the proposal made by the Drafting Committee to include a reference to due diligence.

My government agrees with the Special Rapporteur that, for the moment, the draft principles on occupation should not take into account the international administration of a territory. A UN mission is not likely to meet the criterion of non-consensual presence and there is very little practice where the law of occupation was interpreted to supplement the mandate laid down in UN Security Council resolutions.

With regard to future work, my government supports the Special Rapporteur's suggestion to consider issues relating specifically to non-international armed conflicts. Work on this topic would indeed not be complete without taking into consideration non-international armed conflicts, which represent the majority of modern-day conflicts.

Chapter XI (Immunity of State officials from foreign criminal jurisdiction)

First, my government would like to thank the Commission for its work on this topic, and to the Special Rapporteur in particular for her report. Especially having regard to the divergent views

within the Commission on this topic, we are impressed by the quality of her report, the nuanced approach and the detailed way in which the various issues have been distinguished.

The discussions among the members of the Commission and States in the Sixth Committee have demonstrated that there is no consensus yet on the exceptions and limitations of immunity of State officials. Regretfully, and distracting from the fundamental questions at hand, it seems that the Commission decided to turn to procedural issues on competence and form. While some of these issues, such as voting, merit attention, they should be discussed in general terms and not within the scope of the present issue. My Government would still hope that consensus will soon be reached on Draft Article 7 concerning exceptions and limitations.

As to the question of exceptions and limitations, the Netherlands would like to reiterate its position that it is preferable to refrain from defining crimes and not to include a list. A reference to 'crimes under international law' would avoid unnecessary debates and allow the topic to proceed. This is also the approach taken by the Netherlands in its domestic International Crimes Act. My government would also like to reiterate that it cannot be maintained that immunity *ratione materiae* applies as a blank cover for all acts performed by a State official. There is, in the view of my government, no doubt that such immunity will not cover international crimes.

As to the topic of the present session and the sixth report, my government would like to present the following observations.

First, with respect to the procedural aspect, the Commission could consider distinguishing more clearly between the question of what constitutes the exercise of jurisdiction and the question of when immunities must be considered. The issue before the Commission is limited to the exercise of criminal jurisdiction. That excludes the exercise of other forms of jurisdiction, such as administrative jurisdiction, but includes the acts of other law-enforcement agencies, such as a public prosecutor and the police. Such agencies may and will be confronted with the question of the applicability of immunity. Their analysis as to the applicability may well prevent a case from reaching the courts. The acts of all such agencies constitute the exercise of jurisdiction.

Within the judicial system of the Netherlands, the courts are obliged to consider the matter of immunity *ex officio* and the Netherlands does not require a foreign State to present a statement claiming immunity for it to apply. It would, in the end, be up to the courts to determine this question. As to the questions of the determination of whether a person qualifies as a State official, whether the act complained of was carried out in official function, and in particular the question of who should decide, the Netherlands would acknowledge that, indeed, these are a difficult questions.

With the Special Rapporteur, the Netherlands would support the position that a national court is not obliged to 'blindly accept' a claim of immunity by a foreign State official. A court may consider that a claim to immunity by a foreign State official is actually not valid and/or constitutes an abuse of right. Recently, this was the case with seizure of foreign property in the Netherlands requested by another State for a criminal trial in the latter State. The property was claimed by the owner to constitute state-owned public property by a foreign State. The Dutch court decided it was not and the seizure was deemed lawful. The relevant foreign State did not appeal the decision.

Ultimately, it is a matter of good faith: a claim to immunity that is made in good faith should be considered very seriously and be given due weight. Similarly, however, criminal proceedings started against a foreign State official in good faith should also not be obstructed and labelled as politically motivated without reason.

Second, we are particularly appreciate the emphasis of the Special Rapporteur on the distinction between immunity and inviolability. This is too often overlooked. The Netherlands supports the position that persons enjoying immunity *ratione materiae* do not enjoy inviolability. After all, the immunity applies to the functioning of an official and the question whether his or her acts may be subjected to criminal jurisdiction. The immunity does not apply to the person as such.

In the particular context of a summons to appear, the Netherlands has objected and will also in the future object to any foreign summons to appear to persons enjoying immunity *ratione*

personae. Although not an exercise of criminal jurisdiction, the Netherlands has, for example, objected to a foreign summons to appear directed at its head of State, the King of the Kingdom of the Netherlands. It considers that the inviolability and immunity of its head of State precludes a summons to appear. This applies *a fortiori* when a summons to appear is accompanied by a threat to declare the King in contempt of court should His Majesty not appear. The Netherlands would not object, in principle, to a non-binding invitation to testify addressed to the head of State. It would, however, be very unlikely to grant such a request.

Third, with respect to requests to produce documents, and also precautionary measures in relation to for instance passports, the Netherlands would observe the following. The relevant question is whether the objects requested (documents, passports) are state-owned property with a public, non-commercial purpose. This is evidently the case with passports, which are normally not owned by an individual but by the issuing State. This issue is mentioned by the Special Rapporteur, but it deserves more attention. The Special Rapporteur suggests in her Report that it is not possible to find either special rules or State practice applicable to such measures. My government would like to kindly note that, at least with respect to State-owned property, there are special rules concerning immunity that may be deemed relevant for the consideration of this topic. As codified in the UN Convention on the immunity of States and their property of 2004, state-owned property with a governmental, non-commercial purpose will enjoy immunity from jurisdiction and pre- and post-judgment enforcement measures, while the same does not apply to state-owned property with a commercial, non-governmental purpose. Similarly, the various conventions covering the immunity of State officials, such as the Vienna conventions on diplomatic and consular relations and the Special Missions Convention, contain special rules on the immunity of objects constituting the property of State officials. Finally, as to the suggestion of some members of the Commission to clarify the relation between immunity and State responsibility, my government would like to stress that immunity should not lead to impunity, and that the State of the official should cooperate in the sound administration of justice and assume responsibility for the acts of its state organs that are internationally wrongful.

Thank you, Mr Chairman.