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**Report of the International Law Commission**

**Agenda item 79**

**"ILC Cluster 2"**

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## **Cluster I**

### **Chapter XI**

Chair,

I ask for your indulgence for an additional remark on Chapter XI of the ILC report, in addition to the remarks I made on the topics of cluster I on Tuesday 29 October.

The ILC has completed its work on the responsibility of international organizations. The draft articles on this topic however do not cover the issue of the settlement of disputes of a private law character to which international organizations are a party.

How and on the basis of which standards international organizations settle such disputes is increasingly raising difficult questions. Not only as a matter of principle but also in practice. This involves finding a delicate balance between the immunity of international organizations, which is a vital requirement for their effective functioning on the one hand, and the legitimate expectation of third parties that there be a remedy available to them on the other hand.

The Netherlands believes that this issue is an integral part of the rule of law at the national and international level. How international organizations deal with claims of a private law nature sets a benchmark when such organizations promote the rule of law at the national and international level.

The Netherlands therefore would like to reiterate its appeal to the ILC place the topic of the settlement of disputes of a private law character to which international organizations are parties on its agenda.

## **Cluster II**

### **Chapter VI - Protection of the environment in relation to armed conflicts**

Chair, the Netherlands would like to thank the Commission for its work on this topic and the Special Rapporteur for her second report. I would like to start by expressing our support, in general, for the text of the principles that have been adopted by the Commission this year.

In previous years, the Netherlands has commented on newly proposed draft principles. We appreciate that our comments, for example concerning the risk of broadening the topic beyond the sphere of armed conflict, have been taken on board by the Special Rapporteur and the Commission.

The Netherlands has ratified a large number of the conventions referred to in the report, such as Additional Protocol I and II to the Geneva Conventions of 1949. We hope that these conventions obtain a universal character in the future.

The Netherlands welcomes the questions addressed in relation to non-international armed conflict in the Second Report, as well as the choice by the Special Rapporteur for an approach *ratione materiae* with a reference to "armed conflict" that does not make the distinction between the international or non-international character of such conflict, as is clarified in the Commentary to draft principle 1

As the Commentary to the introduction states, the present set of draft principles contains provisions of different normative value, some reflect customary international law which would be binding upon

States, some are more of a more recommendatory nature with the aim of progressively developing this field of international law.

The Netherlands appreciates that a visible effort has been made to clarify in the Commentary which part of the principles are considered to be a reflection of customary international law. This is achieved through an emphasis on the word "shall". This should, however, always be an exercise carried out with the necessary caution, and my Government would welcome further work on this. In particular, my Government is of the opinion that further clarification would be beneficial with respect to the choice for a general reference to 'armed conflict' and the fact that the principles are not only supposed to reflect customary international law.

### **Chapter VIII – Immunity of State officials from foreign criminal jurisdiction**

Chair, the ILC's work on the topic of immunities for State officials from foreign criminal jurisdiction is part of the law on immunities that the ILC has so successfully addressed in the past.

Although the Commission discussed the sixth and the seventh report of the Special Rapporteur during its present session, my Government has already commented on the sixth report last year, and in this respect I refer to the statement of the Netherlands under this agenda item of the 73<sup>rd</sup> session.

Having considered the seventh report, and the ensuing debate in the Commission, the Netherlands would like to address two issues. The first relates to the foundation of the proposed draft articles and the lack of consensus in the Commission on several fundamental issues. The second relates to the relevance of the proposed draft articles. I will address these in turn, but they are interrelated.

First, the Netherlands would observe that immunity of State officials is not a topic that has emerged only recently. It would also observe that the vast majority of States will not be agnostic as to their views and practice on this topic. With that in mind, the Netherlands shares the concern of members of the Commission, and of many UN Member States as expressed in their interventions last year, that the proposed draft articles now referred to the drafting committee are not sufficiently based on "extensive and virtually uniform" State practice and *opinio juris*. Instead, they reflect an exercise in progressive development. Yet, that should not be necessary with this topic, where State practice is widely available. The Netherlands would urge the Commission to reconsider its work and to ensure that it is based more on State practice and *opinio juris*.

In addition to the absence of sufficient reference to State practice and *opinio juris*, or perhaps because of it, the discussions in the Committee demonstrate an absence, at present, of consensus on the way forward. The proponents of protecting the interests of the State of the official continue to request further safeguards and higher thresholds for the exercise of jurisdiction by the forum State. Simultaneously, the proponents of protecting the interests of the forum State are pointing out that such safeguards and thresholds will actually render it impossible for the forum State to exercise its jurisdiction at any time.

In order to make progress on this topic, the Commission decided to focus on procedural safeguards, without addressing the underlying differences. The result is that the procedural safeguards introduced in draft articles 8 to 16 are interpreted by members of the Commission either as favouring the forum State, or as favouring the State of the official, or even as reflecting the correct balance. The development of procedural safeguards has thus not assisted in resolving the difference of opinion.

Second, the Netherlands would like to note that the relevance to the law of immunities of many of the proposed draft articles and their level of detail is not obvious. Many of the proposed procedural

safeguards do not, in fact, contribute to the rules defining whether immunity exists and what the consequences are of the presence or absence of immunity. Furthermore, many of the draft articles are very detailed. The Netherlands would in this respect agree with members of the Commission that procedural safeguards should be limited to those directly relevant to immunity, and that the proposed draft articles should be streamlined. We would consider that the present level of detail should be avoided, as it distracts from the more important issues. In view of the time permitted, I wish to note two issues, by way of example.

First, the very question whether immunities apply should be the core of the work of the ILC, not the question what exactly is the highest instance deciding on prosecution, the standard of proof in criminal law cases, and the exact contents and form of a notification to the State of the official. Implementing all of these detailed rules may require States to change their municipal criminal law system. This, in turn, may affect the ratification-rates of any prospective convention. At the same time, none of this will be of decisive importance to the question whether immunities apply and what the consequences thereof are.

Second, the Netherlands is concerned with the emphasis placed on the difference between immunity *ratione personae* and immunity *ratione materiae* in the procedural safeguards. This difference is evidently important with respect to the question *whether* immunities apply. But the Netherlands would question its importance in relation to draft articles 8 to 16. First, the obligation to respect immunities when they apply exists independently of whether immunity is invoked. The Netherlands therefore disagrees with the notion that invocation is a condition for the application of immunity *ratione materiae*. Apart from the fact that the rules and procedures of criminal trials often prevent the State of the official to intervene, it is not for the State of the official to ensure that the forum State respects the former's rights under international law. It is for the forum State to do so, regardless of whether it is called upon to do so by the State of the official. Procedures, therefore, should apply equally to immunity *ratione personae* and *ratione materiae*.

Without prejudice to the question of whether all topics proposed in draft articles 8 to 16 are relevant, the Netherlands would agree with some members of the Commission that the drafting of these articles could be improved. Many of the present draft articles contain vague wording. In addition, and perhaps more importantly, there is a lack of clarity as to the extent of the obligation or right that is provided for.

On a final note my Government notes with regret that the Commission has decided to include a list of crimes for the purpose of defining the exceptions to immunity. 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. 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.

The Netherlands attaches importance to the codification and progressive development of the law on immunities, including immunities of State officials from foreign criminal jurisdiction. Yet, on the basis of the concerns just mentioned, the Netherlands urges the Commission to reconsider the topic, and to find consensus on the fundamental notions inherent in it, before developing or adopting any draft articles.

#### **Chapter X - Sea-level rise in relation to international law**

The Netherlands welcomes the decision of the International Law Commission to include the topic "Sea-level rise in relation to international law" in its programme of work and to establish an open-ended Study Group on this topic.

As to the scope of the study, the Netherlands would note that this topic raises many complex questions and that the topic deserves further research. The existing legal framework of UNCLOS may not be equipped to deal with these important problems. The Netherlands appreciates that the scope of the study will include issues in relation to statehood, law of the sea and the protection of persons.

The issue of sea-level rise is of particular importance to the Kingdom of the Netherlands, as it has consequences for all parts of our Kingdom. Some parts of the Caribbean islands of the Kingdom of the Netherlands are not far above the current sea level and may lose a significant amount of land territory as a result of further sea level rise. In the European part of the Kingdom, 26 percent of the land territory currently lies below sea level. This percentage is likely to increase as the sea level rises.

Chair,

The Netherlands has an ambivalent relationship with the sea. In a famous Dutch play, entitled 'Hoping for the best', one of the lead characters observes: "The sea gives and the sea takes". This observation reflects age-old experience in our struggle with water. It is an experience we have shared with others in the past and will continue to share with others in the future, including the International Law Commission, in an era of sea level rise. I would accordingly like to assure this Committee that it can count on the Netherlands to furnish information to contribute to the ILC's work on this important topic.

Thank you.