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Report of the International Law Commission

Agenda item 82

**“Report of the International Law Commission on the work of its seventy-second session,
Cluster 2”**

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Cluster II

Chapter VI - Immunity of State officials from foreign criminal jurisdiction

Chair,

I would now like to turn to the topic of jurisdictional immunities of State officials from foreign criminal jurisdiction. I would like to start by thanking the Special Rapporteur for her Eighth Report. We have followed this topic closely. As the host State to many diplomatic missions and international organisations, the law of immunities is very relevant to the Netherlands. In principle, therefore, we would strongly support the development of this law. This is also why we are currently in the process of ratifying the 2004 UN Convention on jurisdictional immunities of States and their property. A treaty on the jurisdictional immunities of State officials would be a welcome complement to this corpus of law.

However, I regret to say that the present approach of the ILC does not bode well. Chair, my Government is concerned with the application of the general rules of international law to specific issues addressed by the Commission in the context of the present topic. The way in which the topic is dealt with at present demonstrates serious deficiencies in the conceptual underpinnings of the project. That, in turn, is not only to the detriment of general international law, but also undermines the clarity of the proposed rules on immunity as presented by the Commission. I wish to highlight three. Our detailed comments to specific draft articles will be included in the uploaded intervention.

First, the distinction between the primary obligations under the law of immunities and the secondary obligations in the context of breaches of that law is blurred. This causes a lack of clarity with respect to the rules on dispute settlement. It also affects the nature of the provisions included, and the extent to which they reflect obligations of conduct or mere hortatory statements. If and when this document is to become a treaty, the Netherlands will support a compromissory clause including compulsory dispute settlement, preferably at the International Court of Justice. However, such a dispute settlement mechanism, as secondary rules, may be used only to assess whether the States parties to the agreement have complied with their mutual primary obligations under the law of immunity. As long as these primary obligations are not clear, it seems premature to discuss secondary norms.

These primary obligations under the law of immunity must – at least – reflect the essence of the law of immunity. This essence is that immunity applies, or it does not. Whether it applies is irrespective of whether it is invoked. When it applies, it may be waived, but there can be no obligation to waive. That would be tantamount to denying the application of immunity. Considering the provisions on invocation and waivers with this in mind, my Government remains unconvinced by the current approach. While sympathetic to the notion that the question of whether immunities apply be resolved at the earliest possible stage, we cannot support the consequence of that notion now present in the draft articles for the State of the official, in particular in the light of the settlement of disputes. The Netherlands believes that the State of the official cannot be required to provide information to support the application of immunity in a given case, even if it may choose to do so. It can also not be found in breach of the law on immunity for not invoking immunity as soon as possible.

On the basis of the presumption of immunity, the burden of proof is on the forum State. In the same way, the choice to waive immunity is a discretionary one and this decision cannot be subject to dispute settlement.

Second, the Commission sometimes reflects the mere practice of States as supporting a rule of customary international law, whereas this practice may be just that, a practice, rather than the reflection of an obligation. For instance, the Netherlands does not consider that there is support, in State practice, of an obligation to invoke immunity in writing (draft Article 10). There is no support for the *modus* (in writing). As soon as the State of the official's intention to do so is clear, by whatever means, immunities must be considered to be invoked. Also, in light of the presumption of immunity, the Netherlands would question whether the language in the Commentary to draft Article 10, paragraph 2, reflects customary international law. The fact that there is *usus* in invoking immunity does not imply that States have the *opinio* that they must invoke such immunity in order to enjoy it. Invocation confirms a preexisting condition. It is therefore, in the view of the Netherlands, no surprise that relevant treaties do not refer to invocation as a precondition.

Third, the draft articles seems to ignore the general rules on obligations, in particular the rules on what constitutes a binding obligation under international law, rules on circumstances precluding wrongfulness, and rules on the termination, suspension, and invalidity of obligations. This is illustrated, amongst others, by the provision on the irrevocability of waivers (draft Article 11). My Government would consider that this provision should be suppressed. A waiver must be express, and it constitutes a unilateral act of State, binding the State of the official. The forum State has a legitimate expectation that this unilateral act will be performed in good faith.

At the same time, it seems obvious that a waiver may be withdrawn under certain circumstances. These include a fundamental change of circumstances. The Netherlands would also consider that a waiver may be withdrawn when it was provided on the basis of fraudulent conduct of the forum State or under the threat or use of force.

Finally, [Mme/Mr] Chair, in view of the time, I will briefly refer to the position of the Netherlands against the inclusion of a 'without prejudice' clause regarding international criminal tribunals (draft Article 1), and against the inclusion of a list of international crimes (draft Article 7). The full text on these matters is included in the Annex. Suffice it to say here that we will not support the inclusion of a *sans préjudice* clause, and will also not support the inclusion of a list of crimes.

For our further comments on specific provisions, I would like to refer to the annex to the present intervention.

Chapter IX - Sea-level rise in relation to international law

Chair, the Kingdom of the Netherlands welcomes the report of the International Law Commission on the topic "Sea-level rise in relation to international law" and would like to thank the Co-Chairs of the Study Group for their first issues paper.

The issue of sea-level rise is of great importance to the Netherlands. The Netherlands is guided by the notions of legal certainty, stability and security while remaining firmly grounded in the primacy of the UNCLOS.

As to the scope of the study, the Netherlands would like to note that this topic raises many complex questions and that certain subjects deserve further study. The report contains a wide spectrum of thoughts on how to approach and tackle the loss of maritime zones that states experience due to sea level rise. However, in our opinion, some potential solutions deserve more consideration. In particular, we would like to note that the option of merely securing the outer limits of established maritime zones to prevent states from losing maritime zones has not received much attention in the current report.

The Netherlands welcomes the proposal made by the Co-Chairs to further study the issue of navigational charts, and the different functions of the charts of the International Hydrographic Organizations and the charts that are deposited with the Secretary-General of the United Nations for the purposes of registration of maritime zones. The Netherlands would like to observe that the current report does not contain an elaborate discussion on navigational safety and the potential dangers to navigation in case of securing baselines.

The Netherlands looks forward to the upcoming issues papers of the Co-Chairs of the Study Group.

Thank you.

Annex:

In its comments on the work of the ILC in the 6th Commission, the Netherlands has repeatedly expressed its concerns about the introduction, even by means of a *sans préjudice*, of the issue of immunity before international criminal tribunals, including hybrid tribunals, into the work on immunity from national criminal jurisdiction (**draft Article 1**). The Netherlands would consider that a clause explaining that the rules contained in the work before us at present are not applicable to the jurisdiction of international criminal courts and tribunals is not necessary, and uncalled for. As my Government has stated before, the jurisdiction, and the limits thereto, of such courts and tribunals are determined by the States parties to their constitutive instruments.

My Government questions the coherence of **draft Article 4**, on immunity *ratione personae* and *materiae*. Paragraphs 1 and 2 of draft Article 4 describe what immunity *ratione personae* means, presumably reflecting customary international law. However, in paragraph 3, reference is made to ‘international law’ to explain the transition from *immunity ratione personae* to *immunity ratione materiae*. My Government fails to see why such reference would be preferable over the actual inclusion, in the present draft articles, of those rules. Only a *sans prejudice* provision would justify a reference to ‘international law’. The reference in draft Article 4 seems particularly misplaced, since draft Article 6 does deal with the situation of the transition from *immunity ratione personae* to *immunity ratione materiae*. In doing so, however, **draft Article 6**, paragraph 2, should also include the situation in which a State official remains in office, but in a different function.

In relation to **draft Article 7**, paragraph 1, the Netherlands wishes to repeat its position regarding the inclusion of a list, in particular since its comments were

misquoted in the Report of the Special Rapporteur. It is stated for the record that the Netherlands continues to oppose the inclusion of a list of rules of *jus cogens* and of international crimes. An indicative list may be included in the commentary, but should not be included in a draft article. As to the specific list now included: this list is incomplete and seems to be arbitrary. While torture is included, some other serious breaches of human rights and humanitarian law are not. Neither is the prohibition on slavery, nor the right to self-determination.

As to **draft Article 8**, the Netherlands would like to know what is meant by ‘examination’ and also by ‘criminal proceedings’. According to the Netherlands, the forum State is entitled to initiate a criminal investigation, regardless of immunities. Immunities and inviolabilities will apply to the collection of evidence or witness statements from a person entitled to immunity, (pre-trial) arrest, detention, summons to appear etc. As the case may be, applicable immunities must then be waived before the forum State may proceed. My Government has noted the commentary to draft Article 8 *ante*, in paragraph 7 of the Commentary, and the suggestion that the term ‘criminal proceedings’ requires further elaboration. The Netherlands would, in that context, like to repeat that it considers that a forum State is entitled to initiate a criminal investigation, and that this stage of proceedings is not covered by immunities. The Netherlands, therefore, supports the text in the commentary to draft Article 8, paragraph 6.

Draft Article 10 seems to reverse the burden of proof. A person entitled to immunity enjoys that immunity regardless of whether it is invoked. It seems inconsistent to require both that a waiver be express and that invocation be express. It is either/or. The Netherlands operates on the notion of the

presumption of immunity. Immunity is presumed to apply unless it is waived or there is other evidence that immunity does not apply in a given instance.

My Government would consider that **Draft Article 12** is redundant. It is obvious to the Netherlands that such requests may be made, and denied. There is no obligation to comply. The Commission should not waste its precious time on the drafting of this provision.