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**Sixth Committee**

**“International Law Commission: Cluster I”**

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## **Cluster I**

1. The Kingdom of the Netherlands would like to thank the International Law Commission for this year's report. My Government considers this year's report a solid basis for the deliberations of the Sixth Committee.
2. In the view of my Government, the added value of the work of the Commission cannot be underestimated; for more than 75 years, the Commission's work has paved the way for the codification as well as the progressive development of international law. My Government wishes to stress the importance of the diversity and multilingualism of membership of the International Law Commission so as to be able to perform its functions with authority.
3. In this respect, my Government underscores the importance of all of the products of the Commission transmitted to the Sixth Committee, including its reports. Such reports serve as an inspiration for States and may inspire further work or discussions on topics at a multilateral level. In the view of my Government, the reports of the International Law Commission serve to provide policymakers with regular scientific assessments on international law. Through these assessments, the Commission can determine the state of knowledge on international law. In this respect, the Commission acts as a 'science-policy interface'.

4. Pursuant to the Constitution of the Netherlands, its Government must promote the development of the international legal order. The codification and progressive development of international law is pivotal to this end. Thus, the performance by the International Law Commission of its functions assists my Government in fulfilling its constitutional duty. Therefore, the Kingdom of the Netherlands attaches great importance to submitting substantive contributions on the Commission's work, in the form of comments and observations, and to providing the Commission with timely written contributions, in many instances containing examples of State practice.
  
5. Our contributions will often feature advisory reports from the Dutch Advisory Committee on Public International Law, an independent advisory body constituted by a legislative decree. This Advisory Committee advises the Dutch Government, the Senate and the House of Representatives of the Kingdom of the Netherlands on international law issues. The Committee produces advisory reports at the request of the Dutch Government or parliament, but it may also do so at its own initiative. All the products adopted by the Commission on first reading are submitted to this Committee by the Minister of Foreign Affairs for advice. The Advisory Committee reviews the Commission's product and submits its advise in a report to the Minister of Foreign Affairs. The Government is required, by law, to inform parliament of its views on the advisory report.

6. Both the advisory report of the Dutch Advisory Committee and the Government's response thereto, including any comments from Parliament, are then shared with the Commission. By submitting such reports and views, as well as submitting contributions that pertain to State practice, my Government will continue to contribute to the work of the Commission.
7. [Chair,] The Kingdom of the Netherlands would like to express its continuing appreciation for the Commission's valuable and essential work on international law.
8. Before turning to the topics of this cluster, my Government would like to note, with appreciation, that its comments and observations were genuinely taken into account in this year's report.

**Chapters I, II, III and VII (Immunity of State Officials from foreign criminal jurisdiction)**

9. [Chair, please allow me to start with the first topic, that is 'Immunity of State Officials from foreign criminal jurisdiction'.]
10. The Kingdom of the Netherlands would like to take this opportunity to congratulate the new Special Rapporteur with his appointment on the topic of immunity of State officials from foreign criminal jurisdiction and would like to thank him for his first report.

11. Since the beginning of the work on this topic, the Kingdom of the Netherlands has been actively engaged. Oral contributions were made in the discussions of the various reports in the Sixth Committee and, last year, the Kingdom of the Netherlands provided detailed written comments on the complete set of draft articles adopted by the Commission on first reading.

12. My Government appreciates the approach taken by the Special Rapporteur and the Commission's goal on second reading to carefully assess whether a need exists to modify the draft articles and their commentaries based on the observations received, as well as any new developments that the Commission were not able to consider on first reading. My Government is of the view that the topic of immunity of State officials requires such a careful approach. It should do justice to the differing views of States, as well as to the uniform State practice and *opinio juris* that is available concerning the scope and application of immunity.

13. In respect of exceptions to functional immunity, the Kingdom of the Netherlands takes the position that, under international law as it stands, when it comes to the exercise of foreign criminal jurisdiction, functional immunity does not automatically apply to international crimes. However, this is not yet fully crystallised in the Dutch legal practice and the Commission's study on all aspects of such an exception – including by considering the factors of individual criminal responsibility and universal jurisdiction – is encouraged. In this respect, the Kingdom of the Netherlands also notes that the final decision on the exercise of jurisdiction is a matter for the courts.

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

14. Chair, let me now continue to the topic 'sea-level rise' in relation to international law.

15. The Kingdom of the Netherlands wishes to extend its congratulations to the Commission's Study Group on sea-level rise in relation to international law, and in particular to its two Co-Chairs, for the work on the topic.

16. As to the question of sea-level rise in relation to statehood, my Government wishes to make the following remarks.

17. My Government concurs with the conclusion of the Study Group that a distinction must be made between the fulfilment of the criteria concerning the creation of a State as a subject of international law and the considerations that apply for the subsequent continued existence of a State. However, even though the application of the criteria are not the same in respect of the establishment and the continued existence of a State, the two situations cannot be entirely separated, if only because the right of self-determination of peoples applies both to the creation and the continuity of a State.

18. On an earlier occasion, my Government has stated that State practice demonstrates the existence of a presumption of continuity of statehood in cases in which one or more criteria for statehood are no longer met. In the view of the Kingdom of the Netherlands, this presumption of continuity of statehood is, amongst others, inextricably linked to the right of external self-determination of the people or peoples inhabiting the State in question. In this regard, the following is relevant.

19. In the context of decolonization, some newly established States, which were created as a result of the implementation of the right of self-determination, were highly unstable, even for a considerable period of time after their formal establishment. However, regardless of the lack of an effective government in these cases, their statehood was not questioned by the international community.

20. According to the Kingdom of the Netherlands, in respect of the statehood criterion of 'Government', one must make a distinction between, on the one hand, the actual exercise of authority, and, on the other, the right or title to exercise that authority to the exclusion of anyone else. In the view of my Government, in the context of decolonization, such a title derived from the right of self-determination of peoples, is sometimes reinforced by a transfer of sovereignty by the former colonial power.

21. In the colonial context, the right of self-determination meant that colonial peoples had a right to choose between: (a) the establishment of an independent State, or (b) the association with or (c) the integration in another State. When these peoples or their representatives had chosen to establish an independent State, this meant that an exclusive title existed on the part of the Government of the newly established State to exercise authority over the territory of that State and its population. In those cases where there was a lack of actual exercise of authority, even for a considerable period of time after the formal establishment of the new State, this factual deficit did not lead to the impediment or termination of statehood.

22. In these decolonization cases, the lack of actual exercise of authority over territory and people was deemed to be compensated by the exclusive title to exercise authority over the relevant territory and people. This, in turn, is derived from the right of self-determination. Such a state of affairs has also been labelled '*de jure* statehood' or 'juridical statehood', as opposed to a fully effective state entity. However, notwithstanding the *de jure* character of the situation, such entities were regarded and treated as States with all the rights and duties that apply to sovereign States under international law, even if some of these rights and duties could not be effectively implemented as a result of the lack of effective control.



23. This situation of *de jure* or juridical statehood is not a unique feature of the era of decolonization. Several other cases of juridical statehood beyond the colonial context can be referred to, such as the Baltic States during Soviet occupation and States that have lost effective control over their territory.

24. In the view of my Government, the right of self-determination is linked to the continuity of statehood, also in regard to situations beyond the context of decolonization. The right of self-determination beyond the colonial context is not a one-off exercise, but a continuing right. In the post-colonial context, the population of a State has a continuing entitlement to, amongst others, political internal and external self-determination. This also means that the population of a State is entitled to choose, in full freedom, for, amongst others, the continuity of the independence of the State.

25. When large parts of the land-surface of a State or its entire land-surface are submerged by the sea, the actual exercise of authority over the State's original territory and the people that inhabited that territory may become complex and sometimes even impossible. However, given the continuity of the right of self-determination of the population of the State affected by sea-level rise, and presuming that this population has expressed the wish to continue the independence of the State, it could be argued that the Government continues to possess an exclusive title to exercise authority over the area within the formal boundaries of that State and over the people of that State even if and when they are displaced as a result of sea-level rise. This would constitute a sound legal basis of the presumption of the continuity of statehood, at least in these particular situations.

26. My Government would welcome further elaboration by the Commission of the legal basis of the presumption of continuity of statehood in light of the continuing character of the right of self-determination of peoples.

27. Chair, with regard to the discussion of international law on the question of sea-level rise in relation to the protection of persons, my Government wishes to note the following.

28. A rising sea level may not only impact the territory of a State, but also those living on lands belonging to a State. Members of the Study Group noted that the potentially applicable international legal frameworks are fragmented and not specific to the phenomenon of sea-level rise. Furthermore, it was expressed that it is not certain that the current legal frameworks are fully equipped to address the connected challenges. In the view of my Government, this is where the added value of the report lies: identifying the gaps and challenges, as well as identifying current applicable international law with respect to the protection of persons in the context of sea level rise.

29. My Government therefore appreciates the identification of the 12 elements that might be relevant to this topic. My Government believes these elements provide a good basis for further work on this topic. So as to strengthen the additional value of the report for identifying legal gaps and to narrow down the scope of subtopics, my Government would like to underscore the importance of further discussions on several elements in particular.

30. Such elements relate to general human rights obligations, including the different human rights duties and different human rights duty bearers, while taking into account the protection of persons in vulnerable situations.

31. Chair, as it is becoming more likely that persons, and even peoples, may be displaced in the near future due to sea-level rise, my Government reiterates that it considers the principle of non-refoulement and the applicability of complementary protection to be important elements for the consideration of the protection of persons.

32. Finally, the element of international cooperation is imperative when assessing the protection of persons in the face of sea level rise. States are under an obligation to respect, protect and fulfil the human rights of those within their jurisdiction under international human rights law. However, should persons nevertheless become displaced because of sea-level rise and its effects, my Government considers that States have a duty to cooperate to ensure that such persons are relocated. My Government considers this to be a collective responsibility of the international community as a whole.

33. Chair, my Government supports the conclusion of the Co-Chair to submit a joint final report on the topic as a whole. For it considers a report more appropriate for this topic as opposed to, for example, conclusions.

34.As for the joint final report, my Government invites the Commission to respectfully consider integrating the three topics on the basis of different scenario's. These scenario's could be the following:

- A. When a State is not partially or fully submerged, but partially or fully uninhabitable;
- B. When a State is partially submerged and partially uninhabitable;
- C. When a State is partially submerged and uninhabitable;
- D. When a State is fully submerged and uninhabitable.

35.For example, under scenario D, when a State is fully submerged and uninhabitable, and its population becomes displaced, several issues merit further consideration. For example, how the Government of a continued State can exercise jurisdiction over its population in a third State after its population was relocated. Another issue to consider further is how to implement the right of self-determination and individual human rights of the (individuals of) the population in other State(s).

## **Chapter IX (Other Decisions and Conclusions)**

36.Chair, please allow me to turn to the topic 'other decisions and conclusions'.

37. The Commission has suggested two further topics on its long-term programme of work. My Government would recall that the programme already contains several topics that have not been taken up, some of which – in the view of my Government – deserve the Commission's attention as a matter of priority. Such topics include, for example, ownership and protection of wrecks beyond the limits of national maritime jurisdiction; extraterritorial jurisdiction; evidence before international courts and tribunals; and universal criminal jurisdiction. Therefore, my Government wonders whether there is any merit in adding new items to the long-term programme at this stage

Thank you Chair.