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STATEMENT BY

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Agenda item 78

Report of the International Law Commission

Cluster 2

Chapters VII, VIII, IX and XIII

United Nations General Assembly

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4. This is also reflected in the principle of complementarity. The primacy of prosecution of international crimes at the national level is not only logical, it also has major practical advantages.

5. In this regard, I would like to express our concern relating to the necessary criminalization of crimes against humanity at the national level. The report indicates that only 54% of the United Nations' Member States have adopted national legislation expressly addressing crimes against humanity. This is an obligation that not only follows from the Rome Statute, but also from the Geneva Conventions. This must increase! If not, difficulties will arise for the enforcement of a treaty on crimes against humanity, and, more importantly, it will jeopardise the worldwide prosecution and punishment of this very serious crime.

6. Another matter of concern to us is that a convention on the prohibition of crimes against humanity should include provisions on mutual legal cooperation and assistance between states. Although Article 9 of the draft Articles reflects the obligation to prosecute or extradite, this obligation alone will not be sufficient to cover the ways in which states need to cooperate. Therefore, to ensure that it will be truly effective, we suggest specifically addressing additional manners of cooperation and assistance in the next report.

positions. We cannot fail to notice that the Report confirms our position on *jus cogens*, in particular that there is no evidence that progressive development on the topic is needed.

9. As to the issues raised in the Report, let me first address the methodology. The vast majority of sources cited by the Special Rapporteur would qualify as 'doctrine'. This includes separate opinions of judges at the ICJ. There is a reason why 'doctrine' is listed in the ICJ Statute as a subsidiary source of international law, which means that, as the Special Rapporteur correctly notes, it cannot be decisive. Also, there is an abundance of *opinio juris*, or more aptly *opinio juris cogentis*. But what the Report does not clarify is how, in practice, States deal with the notion of *jus cogens* and which complexities, Statiex3(n)(a)8(n)-

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to be considered *jus cogens*. The authoritative nature of such a list composed by the Commission would in all likelihood prevent the emergence of state practice and *opinio juris* in support of other norms.

11. With respect to the issue of non-derogation, we would like to make a few observations. First, as the Special Rapporteur noted, further clarification is required with respect to the legal effect of the concept of non-derogation in relation to norms of *jus cogens* in general and of non-derogation in the specific context of human rights law. Second, the report seems to emphasise the question of whether States could contract out of norms of *jus cogens*. As an aspect of non-derogation, the impossibility of contracting out of such a norm seems obvious. However, we doubt if this a cardinal issue of the complexities of concerning *jus cogens*. After all, it would be quite unusual for States to desire to conclude an agreement expressly contrary to a norm of *jus cogens*. It is not an aim States seek to achieve. Rather than focussing on the impossibility of contracting out of a norm of *jus cogens*, the question should be how the status of *jus cogens* affects an assessment of responsibility for conduct of a State, and the availability of rules justifying such conduct.

12. On the point of universality versus regional *jus cogens*, we do not consider it important that a decision is made in this regard. The qualification of 'universality' attached to norms of *jus cogens* is part of

its hierarchically higher position, rather than a geographical element. The fact that a norm applies universally will underscore its non-derogability, rather than the other way around.

13. Finally, I would like to address the proposed outcome of the work on *jus cogens*, the conclusions. My Government would agree that conclusions would be an appropriate outcome, and also that some degree of flexibility with respect to changing conclusions previously adopted in light of subsequent findings may be necessary. However, in light of a successful completion of this topic, it would also be desirable for the Commission to endeavour to ensure some form of continuity as to its approach.

Chapter XIII
(Other Decisions/Conclusions)

14. With respect to the other Decisions and Conclusions of the Commission, I would like to address the two new topics proposed by the Working Group on the Long Term Programme of Work.

15. First, we welcome the decision by the Commission to include the new topic of settlement of international disputes to which international organizations are parties in its long-term programme of work. In our view this is an important topic that merits study by the ILC. In some

ways it is a logical follow-up to the Commission's work on the responsibility of international organizations.

16. The syllabus states that the proposed topic would be limited to the settlement of disputes to which international organizations are parties. It would not cover disputes to which international organizations are not parties, but are involved in in some other way. We agree with this delimitation of the topic.

17. With respect to the inclusion of disputes of a private law character to which an international organization is a party, my Government would specifically suggest the inclusion of this topic. As the question of the settlement of such disputes is closely related to the immunities enjoyed by international organizations, as well as the latter's obligation to make provisions for appropriate modes of settlement, this topic clearly involves issues of international law. Moreover, in the practice of international organizations it is principally the settlement of this kind of disputes that has led to questions, including notably the matter of private claims arising from the activities of UN troops. The relevance of also addressing the settlement of disputes with international organisations, including disputes of a private law character, was also an important reason why the Netherlands has placed this topic on the agenda of the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI).