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STATEMENT BY

Dr. René Lefeber

Legal Adviser

Ministry of Foreign Affairs

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Kingdom of the Netherlands

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Report of the International Law Commission

Cluster I

(I, II, III (specific issues), IV (crimes against humanity) V (provisional application) and XI (other decisions and conclusions))

1. Mr Chairman, let me begin by expressing my Government's appreciation for the work of the International Law Commission. Today, I will address Chapters IV, V, and XI.
2. Our Comments and Observations resulting from the specific issues raised by the Commission will be submitted in writing in due course.

IV – Crimes Against Humanity

3. My government would like to congratulate the Commission on the successful conclusion of its first reading of the draft Articles on Crimes Against Humanity, and extend its compliments to the Special Rapporteur on Crimes against Humanity, Professor Sean Murphy, for all he has done to enable the swift and successful completion of the first phase of the work on this topic. We intend to submit more detailed comments on the additional draft Articles by the 1st of December 2018 as requested by the Commission. At this stage, I will limit my intervention to a few general observations.
4. I am pleased to note that the current draft brings us closer to the objectives identified in 2013. The obligation to establish national jurisdiction for these crimes combined with the obligation to investigate and prosecute, or extradite, alleged offenders is of crucial importance. As previous reports of the Special Rapporteur have shown, an insufficient number of States have met their obligations under – inter alia – the Rome Statute and the Geneva Conventions in this regard. A future Convention on Crimes against Humanity will – once adopted, ratified and implemented – help to strengthen the legal framework in order to provide accountability and fight impunity. Respecting the principle of complementarity, which rightly places the primary responsibility with States rather than with international structures, is key in this respect.
5. This brings me to the draft provisions on extradition and mutual legal assistance. As stated previously, my Government considers the inclusion

of appropriate provisions on mutual legal cooperation and assistance between States crucial for the effectiveness of the proposed convention. We were therefore pleased to see the additional draft Articles covering these areas. The incorporation and discussion in this report of additional manners of cooperation and assistance provides added value.

6. In this context, please allow me to recall the joint initiative led by Argentina, Belgium, the Netherlands, Slovenia and Senegal for a new treaty on mutual legal assistance and extradition, which would cover the crimes of genocide, war crimes as well as crimes against humanity (a.k.a. the MLA initiative). While continuing to support the Commission's ongoing work on the crimes against humanity topic, the Netherlands together with the other 57 States co-sponsoring the MLA initiative see particular merit in the MLA initiative in that it seeks to offer a modern mutual legal assistance and extradition framework for all three categories of most serious crimes under international law.
7. On this basis, Argentina, Belgium, the Netherlands, Slovenia and Senegal decided to lay the groundwork for the opening of formal treaty negotiations on such a multilateral treaty, representing all continents, including both ICC and non-ICC State Parties. Last week, the Netherlands hosted a Preparatory Conference for the MLA Initiative. During the conference, 42 co-sponsoring States, distinguished experts and representatives of civil society were given the opportunity to discuss and advise on the organization of potential treaty negotiations.
8. The overwhelming majority of participants agreed that the MLA treaty should extend to the crimes of genocide, crimes against humanity and war crimes, and that the definitions of the crimes are not to be re-negotiated. Participants voiced their support for drawing from similar, previously-adopted and widely accepted provisions from modern treaties on mutual legal assistance dealing with other international or transnational crimes which does not preclude the inclusion of other provisions to the treaty. The discussions provided clarity on the type of provisions most participants would prefer to have in the treaty, including technical provisions that will meet the needs of practitioners. The preparatory conference provided for numerous valuable contributions with regard to a specific proposal for a preliminary draft text and accompanying timeframe.

9. Although there are convergent qualities between the MLA initiative and the ILC's ongoing work on crimes against humanity, there are also important differences, notably regarding the envisaged scope of application. We therefore consider that both initiatives are complementary, and that they can co-exist and be developed side by side. In this light, we would welcome close cooperation between the Commission and the promoters of the MLA initiative in order to strengthen synergies and improve legal cooperation with a view to the shared objective of combating the most serious international crimes.

Chapter V – Provisional Application of Treaties

10. With respect to the topic of provisional application of treaties, my Government would like to align itself with the comments made by the European Union. We would like to thank the Commission for its efforts to provide guidance and clarifications. We also thank the Secretariat for its latest Memorandum providing useful background information and confirming the flexible nature of the instrument as it is applied in the practice of States and international organizations..
11. As the Commission recognizes, provisional application of treaties serves a useful purpose in the treaty relations between States and international organizations. Against this background, we appreciate the efforts of the Commission to retain an element of flexibility in the text of the draft guidelines and not to be overly prescriptive as it is often the specific circumstances of the case at hand that determine the solutions available and the course of action taken in concrete situations. The Guidelines generally reflect this, and the Commission wisely abstained from converting each and every possible legal arrangement in the Guidelines as some issues are more suitable for being addressed in the Commentary.
12. Regarding the Commentary, we would like to mention the commentary to Guideline 8 in which the Commission explains that it decided not to introduce a notice period for termination of provisional application analogous to provisions of that kind regarding denunciation or withdrawal from treaties. We support this decision for the reasons mentioned by the Commission related to flexibility and lack of sufficient practice. At the same time, we would like to reiterate a remark we made earlier that any obligations incurred as a result of the provisional application of a treaty and, hence, the application of *pacta sunt servanda*, may not end with the

termination of provisional application of a treaty. When termination of provisional application by a State adversely affects third parties, including individuals, acting in good faith, obligations emanating from the provisional application of a treaty may well outlive its formal ending. This may require a transitional regime with respect to, or even the continuation of, obligations arising from the period of provisional application with respect to third parties acting in good faith.

XI – Other Decisions

General Principles

13. With respect to the Commission's long-term programme of work, my Government notes the inclusion of the topic of general principles of law with great interest. My Government would like to express appreciation for the note prepared by Mr. Marcelo Vázquez-Bermúdez, annexed to the Report of the Commission. We would welcome a contribution of the Commission on the topic of general principles of law, as the topic deserves further research and attention. As for the scope the study, I would like to present the following observations.
14. First, I am pleased to note that the scope of the study by the Commission will include the nature and origin of general principles of law, as further clarification by the Commission on this issue would be desirable. In particular, the question whether these principles must solely be derived from domestic legal systems or whether general principles of law can also derive from other sources, such as the international legal system, requires further analysis.
15. An inquiry into the question how general principles come into being and how such principles develop or have developed over time would have added value. The Netherlands therefore strongly supports the inclusion of these questions in the scope of the topic, as suggested by Mr. Marcelo Vázquez-Bermudez.
16. Secondly, we welcome the inclusion of the question concerning the place of general principles of law within the international legal system and whether they are to be considered as a principal and autonomous source of international law. While general principles are contained in Article 38(1)(c) of the Statute of the International Court of Justice, the legal

character of general principles of law has been the subject of discussion. Therefore, my Government would welcome further research into this question.

17. Thirdly, we would fully agree with the Commission that the relation between general principles of law and customary international law deserves further clarification. In particular, we would support further analysis whether general principles can arise and develop in separation from customary international law.

Evidence before International Courts and Tribunals

18. My Government would also welcome the inclusion of the topic of evidence before international courts and tribunals in the long-term programme of work of the Commission. In particular, my Government would agree with the notion that the uncertainty faced by States in international judicial settlement mechanisms as to the standard of evidence that is required is undesirable.
19. However, the Netherlands would like to see some of the elements included in the proposal. First, it is not obvious that the same standard of evidence should apply to all international courts and tribunals. Due to the difference in nature of international disputes, the standard of evidence may vary. This should not prevent a consideration of rules of evidence of general application or an attempt to find similarities between different dispute settlement mechanisms. However, the exact standard of evidence and other rules and principle applicable to evidence may, and should, vary according to the nature of the dispute before a court.
20. Secondly, my Government acknowledges the differences between international dispute settlement in cases in which at least one State is involved and the procedures before international criminal tribunals in which an individual as opposed to a State is indicted with an international crime. Yet, we would question the exclusion of all practice and experience of the various international criminal tribunals in general. Their practice may *mutatis mutandis* be relevant. A particularly relevant issue is the way in which the International Criminal Court would deal with a case concerning the crime of aggression. Even if in such a case it will still not be a State standing trial, the responsibility of a State for committing the wrongful act of aggression will have to be established. My Government

would therefore welcome the inclusion of the practice of the international criminal tribunals, where appropriate.

21. Thirdly, my Government considers the practice of the various human rights instruments in individual complaints procedures relevant and would not support their exclusion for the mere reason that they are not courts. Just as the practice of the African, European and Inter-American Courts of Human Rights is relevant, so is the practice of the human rights monitoring bodies in Geneva in individual complaints procedures. Their practice is relevant because they operate on a predetermined set of rules of evidence and influence other international dispute settlement mechanisms.
22. Based on these three considerations, my Government would suggest that perhaps a more useful criterion to guide the direction of the topic of evidence is the question whether State responsibility is established in a particular international dispute settlement procedure and whether this procedure operates on the basis of standard or pre-determined rules of evidence. Even without explicit rules of evidence, a dispute settlement mechanism may still operate on the basis of its own practice as developed over the years.
23. I thank you for your attention.