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Report of the International Law Commission

Agenda item 79

“ILC Cluster 1”

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Chair,

The Kingdom of the Netherlands would like to express its continuing appreciation of the work of the International Law Commission and its contribution to the codification of international law as well as its progressive development. The Netherlands also wishes to thank all the members of the Commission for their contribution to the work of the Commission this year. The Netherlands also congratulates the Commission, and its chair for the report to the Sixth Committee. This report provides a good basis for the discussions to be held in this Committee.

Chapters: I, II, III, IV - Crimes Against Humanity

Chair,

The Netherlands welcomes the ILC Draft Articles on Crimes Against Humanity and strongly supports the recommendation of the Commission for the elaboration of a convention by an international conference of plenipotentiaries on the basis of the draft articles. We associate ourselves with the statement on the draft articles by the EU which is reflective of our support and the longstanding commitment of the European Union as well as of its Member States to the fight against impunity for the most serious crimes of concern to the international community as a whole.

As one of the initiators of the initiative for an international convention on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity and war crimes a.k.a. the MLA-initiative – now supported by 69 States – please allow me to also address the question regarding the relationship between a future convention on crimes against humanity and the MLA-initiative. Let me note that although there are convergent qualities between the MLA-initiative and the ILC Draft Articles, there are also relevant differences.

Relevant differences between both initiatives include:

- Scope of application *ratione materiae*: the MLA initiative seeks to offer a mutual legal assistance and extradition framework for all three groups of the most serious crimes under international law. The most recent draft includes a mechanism that allows for the optional broadening of the scope to other international crimes, such as torture and enforced disappearances. The ILC Draft Articles focus exclusively on crimes against humanity;
- Differences in approach: the ILC Draft Articles have a holistic approach and aim to deal with a wide range of rules and concepts, ranging from MLA and extradition to prevention, state responsibility and reparations for crimes against humanity. The MLA initiative, on the other hand, is aimed at creating a modern framework for mutual legal assistance and extradition. The scope of the provisions on mutual legal assistance and extradition as covered by the MLA initiative is likely to be wider and more extensive than the procedural provisions of the ILC's Draft Articles;

Other differences concern the framework and likely timeline for negotiations for both instruments. Based on their respective qualities and characteristics, I would like to stress that the two initiatives are mutually supportive as they work towards the same goal: both seek to fill a gap in the legal framework that underpins the fight against impunity for the worst international crimes. While

doing so, both initiatives proceed along different trajectories and with different scopes. Both frameworks can therefore be seen as complementary, and can co-exist and continue to develop side by side.

We look forward to discussing these and other questions at the side-event which is organized directly after this morning's session, starting at 1:15pm in Conference Room 12.

Chapter V - Peremptory norms of general international law (*jus cogens*)

The Netherlands wishes to extend its congratulations to the Commission and to the Special Rapporteur for the work on this topic. My Government notes that the Commission has adopted the draft conclusions on peremptory norms of general international law (*jus cogens*) on first reading. While the Netherlands would recognise the added value of the consideration of this topic by the Commission, my Government notes with regret that our concerns expressed in previous years have not convinced the Commission to make corresponding changes to its conclusions or, at least, to explain why our concerns were not convincing.

In regard to the inclusion of a list of norms of *jus cogens*, the Special Rapporteur, in his Fourth Report, makes reference to a remark by the Netherlands, in regard of the Special Rapporteur's Third Report, as containing a proposal for the inclusion of a list norms of *jus cogens*.¹ The Netherlands believes, however, that the proposal referred to has been misunderstood by the Special Rapporteur. During the debate last year, my Government considered, in accordance with its position in previous years, that the inclusion of a list of norms having the status of *jus cogens* was not desirable. My Government furthermore stated that in case the inclusion of a list of norms of *jus cogens* was nevertheless deemed necessary, reference could be made to the Commentaries to Articles 26 and 40 of the Articles on the Responsibility of States for Internationally Wrongful Acts. These Commentaries include tentative and non-limitative lists of peremptory norms. With this remark, my Government did not mean that the examples mentioned by the ILC in its Commentaries to Articles 26 and 40 could be used as a basis for a list, but that a list of *jus cogens* norms could be replaced by a mere reference to the ILC's Commentaries to Articles 26 and 40 of the Articles on the Responsibility of States for Internationally Wrongful Acts.

The Netherlands remains of the view that the inclusion of a list of peremptory norms is not desirable. In this regard, it reiterates its position that the authoritative nature of a list, illustrative or otherwise, composed by the Commission would in all likelihood prevent the emergence of State practice and *opinio juris* in support of other norms.

¹ Para. 54. "While this last reason for not having an illustrative list is compelling, the Special Rapporteur is of the view that that it would be a missed opportunity if the Commission did not provide "something". In this respect, inspiration may be taken from the encouragement of Brazil that a creative way be found to balance the two competing interests, i.e., the value of the illustrative list on the one hand and the fundamentally methodological nature of the current topic on the other. The Special Rapporteur found the alternative proposal of the Netherlands particularly helpful in this regard. While not supporting an illustrative list, the Netherlands did make the following observation:

'If the inclusion of a list was nevertheless considered necessary, a reference should be made to the commentaries to articles 26 and 40 of the articles on responsibility of States for internationally wrongful acts, which included tentative and non-limitative lists of *jus cogens* norms'".

We have forwarded the draft conclusions and corresponding commentaries on peremptory norms of general international law to our national Advisory Committee on Issues of Public International Law, and requested it to provide an independent advice on the draft conclusions and commentaries. My Government will provide its written comments and observations on the topic of peremptory norms of international law (*jus cogens*) in due course together with the advice of the Advisory Committee.

Chapter XI - Other decisions

The Netherlands wishes to make some remarks on the proposal to include the topics 'reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law' and 'prevention and repression of piracy and armed robbery at sea' on the agenda of the International Law Commission.

With regard to the proposed new topic on reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law, we note that the General Assembly has already adopted the so-called "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", which were the result of many years of in-depth study. We are therefore yet to be convinced of the need and added value of the proposed study. In our view, better implementation of these existing principles and guidelines is called for, which would best serve the fight against impunity and needs of victims.

With regard to the proposed new topic on prevention and repression of piracy and armed robbery at sea, the Netherlands sees some relevance for limited work by the ILC. As indicated in the relevant document regarding this topic,² there is already an extensive amount of international, regional and national law regarding piracy at sea. With respect to the existing international obligations regarding piracy at sea, the Netherlands sees therefore no need at this stage for further guidance or clarification. Furthermore, there have been positive developments in recent years in the fight against piracy, in particular it seems that the incidents of piracy at sea have been reduced due to successful efforts in the prevention of these crimes. Most of the current incidents seem to occur within territorial seas. In that respect, it would seem more useful to focus on armed robbery at sea and to provide guidance for the development of domestic criminal law.

Thank you

² UN Doc. A/74/10, Annex C.