Check against delivery

STATEMENT BY

Dr. Liesbeth Lijnzaad

Legal Adviser, Netherlands Ministry of Foreign Affairs

Sixth Committee

Agenda item 78

Report of the International Law Commission

Cluster 2

Chapters VII, VIII, IX and XIII

United Nations General Assembly

71st Session

Chapter VII

(Crimes Against Humanity)

Mr. Chairman,

1. First of all I wish to congratulate and compliment the Special Rapporteur on Crimes against Humanity, Professor Sean Murphy, on the excellent work on the second report and the six additional draft articles regarding crimes against humanity. (A/CN.4/690). The broad attention for other states' regulation of the prohibition of crimes against humanity is both interesting and insightful.
2. We noticed that the definition of crimes against humanity as laid down in draft article 3 is nearly the same as the definition laid down in the Rome Statute. Given that the definition in the Rome Statute reiterates an existing rule of customary international law, it makes sense to use this definition. I will now turn my attention to the means of prevention and enforcement.
3. We agree with the Special Rapporteur's conclusion that, in order to be truly effective, the enforcement of crimes against humanity should take place at the national level. This is also why the Preamble of the Rome Statute stresses that the effective prosecution of the most serious crimes of concern to the international community, must be ensured by taking measures at the national level.

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.

7. In this respect I would also like to take this opportunity to again draw attention to the initiative to conclude a new multilateral treaty on Mutual Legal Assistance and Extradition for the domestic prosecution of the most serious international crimes. As of today, 52 states have expressed support for the opening of negotiations on such a multilateral treaty, representing all continents, as well as both ICC and non-ICC State Parties. Support for such an instrument is growing steadily. We are currently discussing when we will begin the negotiations for the actual treaty. We would welcome close cooperation between the ILC and the promoters of the initiative to improve legal cooperation in the area of combating the most serious international crimes.

Chapter IX

(*Jus Cogens*)

8. Although we remain of the opinion that the topic of *jus cogens* should not have been included in the programme of work of the Commission, we do want to thank the Special Rapporteur, Professor Dire Tladi, for his first report. The Report contains a thoughtful overview of the history of the concept of *jus cogens* and presents the various relevant

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, if any, this gives rise to. Whatever the outcome of the work of the Commission with respect to *jus cogens*, it should take into account, and be based upon this State practice. If it appears that there is insufficient State practice, this should lead to reconsideration by the Commission of the necessity of its work on *jus cogens*.

10. On the question of whether the ILC should provide a list, illustrative or otherwise, of the norms considered to have the status of *jus cogens*, we are of the opinion that the drafting of such a list is not desirable. Even if the Commission would stress that the list is illustrative, the mere existence of the list will create a high threshold for future norms

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).

18. With respect to the topic of Succession of States in respect of State Responsibility, my Government remains to be convinced of the need to include this topic in the work of the Commission. We do however accept that this may be a topic of relevance for other States.

19. A leading principle underlying State succession is that no vacuum in terms of state responsibility should emerge either in cases of dissolution of states or the creation of new states, whether that is a result of integration, association, secession or decolonization.

20. State practice as well as case law suggests that successor states are generally aware of the need to avoid the creation of a vacuum in terms of state responsibility, through the conclusion of agreements among them. In situations of unilateral secession or annexation, such agreements will often be difficult to reach, but their absence does not result in a vacuum either: the former would be covered by Article 10 of the Articles on Responsibility of States for Internationally Wrongful Acts; the latter by the rules on unlawful occupation.

21. Consequently, and in particular in view of the lack of state practice and judicial decisions that indicate a legal lacuna, my Government doubts whether there is an immediate need for the Commission to take up this topic.

22. And finally, I would like to join those who have spoken before me and have expressed doubt about the desirability of the ILC's wish to meet in New York. The Commission is an independent body, and should continue to carry out its expert work away from UN Headquarters. The political debate – in fact the debate we are having today – should take place only once the reflection on the substantive issues has been concluded and the annual report is presented – and not in conjunction with the traditional work of the Commission. To confuse both stages of the working process would be neither wise, nor desirable.

23. I thank you for your attention.