Check Against Delivery

STATEMENT BY

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Cluster III

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(VIII (Jus cogens), IX (Succession of States) and X(Protection environment))
VIII (peremptory norms of international law (*jus cogens*)

1. Mr Chairman, let me start by congratulating the Special Rapporteur, Mr Dire Tladi, on his thoughtful Second Report. My Government particularly welcomes the inclusion of references to judicial decisions of national courts and international tribunals.

2. As the debates in the Commission have demonstrated, many elements of *jus cogens* remain contested, while their elucidation is essential for arriving at clear and constructive conclusions about *jus cogens*. In this respect, the Kingdom of the Netherlands would share the concern also voiced by France last year and before with respect to the lack of clarity on the concept of *jus cogens* and in particular its application. The Kingdom of the Netherlands would also hope that the Commission will continuously evaluate its progress on this topic and will not hesitate to return to topics earlier discussed in the light of later conclusions.

3. As to the specific issues discussed by the Commission this year, I would like to make the following observations. My Government would support the notion that customary international law constitutes the most important basis for rules of *jus cogens* and would share the hesitations with respect to deriving *jus cogens* from general principles and treaty provisions. Most general principles lack the non-derogatory character of rules of *jus cogens* and many treaty provisions lack universal application. If they do, it is usually through their customary status in addition to being included in a treaty. Universal adherence to a treaty is an exception rather than a rule. In addition, my Government would support the notion of the two-pronged test: to attain the status of *jus cogens*, (1) both recognition of the rule as such (practice and *opinio juris*) and (2) of its peremptory status (practice and *opinio juris cogentis*) are required.

4. We have noted that the drafting committee solved the question of whether rules of *jus cogens* **protect** or **reflect** fundamental values by including both. However, my Government would question the relevance of whether *jus cogens* is protecting or reflecting fundamental values. What matters is that the norm in question is accepted and recognized by the international community as having the status of *jus cogens* and that no derogation is possible.

5. As to the issue of the inclusion of a list of norms having the status of *jus cogens*, the Kingdom of the Netherlands would like to reiterate its position that it prefers not to include such a list. 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. If the inclusion of a list is nevertheless considered necessary, my Government would suggest a reference to the Commentaries on the Articles on State Responsibility to Articles 26 and 40, which include tentative and non-limitative lists of peremptory norms.

6. As to the field of application of *jus cogens*, this should by no means be limited to the law of treaties. It is also important to discuss the effect of the status of *jus cogens* of a norm in the context of jurisdiction and immunities, for instance. In addition, the relevant rules contained in the Articles on State Responsibility should be taken into account.

7. As to the next steps, I would like to make a final observation. The present report includes practice on the definition of *jus cogens*, which varies between the various courts and tribunals. This, however, leaves open the question of its effect. My Government is most concerned with the question of what it means that a particular rule is hierarchically superior to another.

8. Non-derogability is not merely a consequence of the status of *jus cogens*. It is also a characteristic, because a rule from which derogation is possible cannot be a rule of *jus cogens*. At the same time, as my Government has stated before, the primary question should not concern the possibility of contracting out of a norm of *jus cogens*. The more important element of non-derogability relates to the question of how the status of *jus cogens* affects an assessment of responsibility of the conduct of a State, and the availability of rules justifying such conduct. In this respect, my Government cannot but note the scarcity of state practice on this question. Therefore, we encourage the ILC to make an analysis of how, in practice, states and their courts have dealt with the question of the effect of *jus cogens* and the weight attached to it in relation to other applicable rules.

Chapter IX – Succession of States in respect of State Responsibility

9. My Government would like to congratulate Mr Pavel Šturma on his appointment as Special Rapporteur and has taken note of the work of the Commission on the topic of succession of states in respect of State responsibility. I wish to make the following remarks.

10. Regarding the proposed outcome document of the work on this topic, the Kingdom of the Netherlands is not convinced that this should take the form of draft articles with commentaries. In our view, it would be more appropriate to develop a set of principles or guidelines.

11. With respect to the content, the elaboration of any specific principles or guidelines for this topic should be based on the leading principle underlying State succession and responsibility. This is the principle that no vacuum in terms of State responsibility should emerge in cases of dissolution or in cases of unification, where the original State has disappeared, or in cases of secession, where the predecessor State remains. The transfer or not of rights or obligations in specific situations should be assessed on a case-by-case basis and be addressed in a succession agreement.

12. My Government therefore welcomes the suggestion by the Special Rapporteur, [Mr Pavel Šturma], to stress the priority of the conclusion of agreements between States. State practice as well as case law suggest 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. Given the sensitive nature of succession of States, and the need for flexibility for states to negotiate the conditions of a succession, any principles or guidelines should be of a subsidiary nature and serve as a model for the conclusion of agreements.

Chapter X – Protection of the environment in relation to armed conflict

13. Concerning the topic of the Protection of the environment in relation to armed conflicts, my Government would like to thank the former Special Rapporteur, Ms Marie Jacobsson, express its appreciation for her contribution to the topic and welcome the appointment of Ms Marja Lehto as Special Rapporteur. I would also like to extend my congratulations to Mr Marcelo Vázquez-Bermúdez for this appointment as Chairman of the Working Group on the topic "Protection of the environment in relation to armed conflicts".

14. We take note of the statement by the Working Group on the importance to complete work on the topic. However, I would like to reiterate our assessments as expressed in 2014 after consideration of the first preliminary report. Then, we noted that the overall purpose of the study would be only to clarify existing rules and principles of international environmental law to armed conflicts. We urge the Commission to refrain from redefining the recognized existing rules of international humanitarian law. In general we would urge the Commission not to broaden the topic too much.

15. In this context, we note the reference that was made in the Working Group to issues of complementarity. While in our view it would be useful to explore this issue somewhat further, we would caution against further broadening of the topic.

16. I thank you for your attention.