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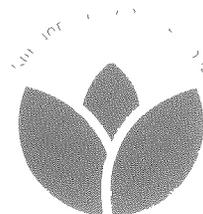
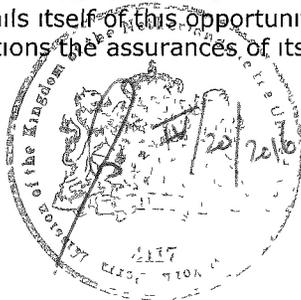
**Our reference**  
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**Annex**  
8 pages

The Permanent Mission of the Kingdom of the Netherlands to the United Nations presents its compliments to the Secretary-General of the United Nations and submits the following comments in response to the invitation in operative paragraph 5 of General Assembly Resolution 70/236, adopted under agenda item 86, regarding the request of the International Law Commission (ILC) for the views of States on the various aspects of the topics on the agenda of the ILC, in particular on all the specific issues identified in chapter III of its report

The specific issues on which the Kingdom of the Netherlands presents its comments are a) Subsequent agreements and subsequent practice; b) Protection of the environment in relation to armed conflicts; c) Immunity of State officials from foreign criminal jurisdiction; d) Provisional application of treaties, and E) *Jus cogens*. The comments presented by the Kingdom of the Netherlands are included in the annex to this Note Verbale

The Permanent Mission of the Kingdom of the Netherlands to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.



## E. *Jus cogens*

### a. Official statements

The Kingdom of the Netherlands recognises the existence of norms of *jus cogens*. In its written submission to the International Court of Justice in the *Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, the Kingdom of the Netherlands stated that 'the obligation to respect and promote the right to self-determination as well as the obligation to refrain from any forcible action which deprives peoples of this right is an obligation arising under a peremptory norm of general international law'.<sup>17</sup> It also stated that, in this context, 'the principle of territorial integrity may not, at least not under all circumstances, prevail'.<sup>18</sup> It concluded that 'the right to political self-determination includes the right to external self-determination in the case of a serious breach of [this] obligation [ ] where all effective remedies have been exhausted. The recognition of Kosovo by the Kingdom of the Netherlands is based on this legal opinion and constitutes an instance of State practice in a case where the conditions for the exercise of the right to external self-determination were satisfied'.<sup>19</sup> The same position was also stated in the oral statement of the Kingdom of the Netherlands of 10 December 2009.<sup>20</sup>

In the context of the Organization for the Prevention of Chemical Weapons, the Kingdom of the Netherlands supported initiatives to declare that the absolute prohibition of the use, under all circumstances, of chemical weapons has evolved into a peremptory norm of customary international law and is, therefore, binding upon all States.<sup>21</sup> While many at the Review Conference expressed support to the customary nature of the prohibition of the use of chemical weapons, the Kingdom of the Netherlands emphasized that this prohibition applies under all circumstances, expressing its peremptory.

There is no express reference to peremptory norms under international law in Dutch legislation. The Dutch legal system is largely monist in nature and therefore international law will be applicable in the Dutch legal order. Article 94 of the Dutch Constitution provides that treaties and binding decisions of international organisations, to the extent that they are binding on all persons, will prevail over provisions of national law in case of conflict between a provision of a treaty or binding decision of an international organisation and a provision of national law.<sup>22</sup> The prevalence of international law over national law in case of conflict is however limited to treaties and decisions of international organisations and does not apply to rules of customary international law. While any rule of *jus cogens* is binding on the Netherlands under international law, it may not overrule a rule of national law when the relevant rule is one of customary international law (as opposed to a rule contained in a treaty or a binding decision of an international organisation).

The recognition of a particular norm as a norm of *jus cogens* and the legal effects attached to such recognition under international law will also apply under Dutch law. This has been expressly provided for in the International Crimes Act (Wet Internationale Misdrijven, hereinafter: ICA), which stipulates in Article 16 that immunities will be applied to the extent recognised under international law.<sup>23</sup> Therefore, as has also been explained above, in section C, if and when an exception to immunity

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<sup>17</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p.403, Witten Statement of the Kingdom of the Netherlands, 17 April 2009, P.7.

<sup>18</sup> *Ibid.*, P. 8.

<sup>19</sup> *Ibid.*, P. 13

<sup>20</sup> *Ibid.*, Verbatim Record CR 2009/32, p. 8-17.

<sup>21</sup> See, amongst others, the Statement by the Kingdom of the Netherlands at the closure of the Third Review Conference on the Convention on the Prohibition of Chemical Weapons, doc No. RC-3/NAT.60, in which the Netherlands expressed its disappointment at the inability of the Review Conference 'to state that the use of chemical weapons is, under any circumstances, contrary to international law' (available at [https://www.opcw.org/fileadmin/OPCW/CSP/RC-3/national-tatements/rc3nat60\\_e\\_.pdf](https://www.opcw.org/fileadmin/OPCW/CSP/RC-3/national-tatements/rc3nat60_e_.pdf)).

<sup>22</sup> See <http://wetten.overheid.nl/BWBR0001840/2008-07-15#Hoofdstuk5>

<sup>23</sup> <http://wetten.overheid.nl/BWBR0015252/2006-01-01#4>. For the text, see above, section C

would exist under international law denying immunity in the case of breaches of peremptory norms, this exception would also apply in the Dutch legal order

*b. Decisions of national courts*

Due to the exceptional nature of *jus cogens* and the fact that this status is attributed to very few norms only, practice, in particular judicial practice, with respect to the concept of *jus cogens* is not abundant. In 1962, the Supreme Court of the Netherlands found that States do not lose their immunity from jurisdiction when accused of a breach of a peremptory norm (Supreme Court, decision of 26 January 1962, NJ 1962, 74) Similarly, the Supreme Court found in 2012 that the immunity of the UN was absolute and would not yield when the UN would be accused of a breach of a peremptory norm (Supreme Court, decision of 13 April 2012, ECLI:NL:HR:2012:BW19990)