Islamic Republic of
I R A N
Permanent Mission to the United Nations

Statement by

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on Agenda item 81:

Report of the International Law Commission

on the work of its sixty-third and sixty-fifth sessions

Part Three (Chapters VI, VII, VIII, IX, X, XI and XII):

Protection of persons in the event of disasters

Formation and evidence of customary international law

Provisional application of treaties

Protection of the environment in relation to armed conflicts

The Obligation to extradite or prosecute (aut detere aut judicare)

The Most-Favoured-Nation clause

Other decisions and conclusions of the Commission

New York, 5 November 2013

بسم الله الرحمن الرحيم

Mr. Chairman,

In its third statement under this agenda item, my delegation would like to share its views and comments on the "Protection of persons in the event of disasters", "Formation and evidence of customary international law", "Provisional application of treaties", "Protection of the environment in relation to armed conflicts", "the Obligation to extradite or prosecute *(aut detere aut judicare)*", "The Most-Favoured-Nation clause" and "Other decisions and conclusions of the Commission". In the interest of time I would confine my presentation of this statement only to Chapters VII, VIII and IX. Our full written statement can be accessed through the Sixth Committee records, Papersmart and the website of the Permanent Mission of the Islamic Republic of Iran to the United Nations.

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Chapter VI

"Protection of persons in the event of disasters"

Mr. Chairman,

My delegation expresses its appreciation to Mr. Eduardo Valencia-Ospina, the Special Rapporteur, for his sixth report on the topic.

Although the work of the Commission on the topic during its last session was mainly devoted to the different aspects of prevention, the recollection of the articles proposed and discussed so far in the report gives us again the opportunity to express our reservation with draft article 11. Paragraph 2 of this draft article envisages that "consent to external assistance (by the State victim to the disaster) shall not be withheld arbitrarily", an evidently subjective criterion the determination of which is left to the free decision of actors, third states or humanitarian actors. Such determination risks being influenced by political factors which could bring about legal consequences for the affected State. It should only be left to that State to determine its own capacities of reaction in the face of disasters and to decide whether it is in a position to implement the necessary means to confront them. Therefore we believe that the content of paragraph 2 of draft article 11 should be replaced with the notion of "good faith", meaning that "consent to external assistance shall be decided in good faith".

It is doubtful whether there is an obligation to prevent disaster risks, along with the legal obligation of the State to react to disasters and to save people residing in its territory. It is in the interest of States to adopt a specific policy to prevent disaster risks. Obviously many states have acted in this sense, among which Iran has a comprehensive legislation which *inter alia* provides for sophisticated programs of staff training aimed at intervening in this kind of situations. Simulation exercises are regularly implemented in the framework of school programs to prepare the young to get familiar with proper reactions in case of earthquakes. Exchange of experience between countries that have confronted natural disasters over the past decades, could have helped States to establish an early warning system of their choice. None of these should be misperceived as presumption of an obligation by States to prevent disasters, however. Still, States may choose to establish a treaty-based legal obligation on disaster prevention through adopting a multilateral instrument and agree on a set of preventive measures and policies of legislative and administrative nature and the like. The final form of the text proposed by the Commission will determine the nature and scope of preventive measures that States might opt to follow.

Chapter VII

"Formation and evidence of customary international law"

Mr. Chairman,

On this topic my delegation wishes to express its appreciation to the Special Rapporteur, Sir Michael Wood, for his first report. We welcome the decision of the Commission to change the title of the topic to "Identification of Customary International Law" and believe that it does not affect the scope and the mandate given to the ILC.

Despite the controversy about the source of preemptory rules, *jus cogens*, it should be noted that this concept is more related to the hierarchy of the norms of international law. And its formation follows a different path of that of customary international law. Some of the applicable rules in this regard such as "persistent objector" have no place in the formation of a *jus cogens* norm. This is the reason why it has to be removed from the study. Nevertheless, the existing interest in imperative norms and lack of generally accepted criteria for their identification deserve to be approached by the Commission which could determine under what conditions an ordinary rule reaches the status of a *jus cogens*. Such a study would clear up the doubts and difficulties surrounding the issue.

In order to preserve the unity of the rules of customary international law and prevent its fragmentation, the Special Rapporteur should avoid approaching each branch of international law differently by according each of them a different weight. The tendency to give priority to *opinio juris* at the expense of State practice in certain fields, such as international criminal law, presents the great risk of endangering the unity of international law. In all cases, a customary rule of international law does not emerge unless both elements of *opinio juris* and State practice are firmly established.

It is relieving to see that the special Rapporteur insists on the necessity to consider State practice in all legal systems and all the regions of the world respectively. Such an approach would indeed guarantee the universality of international law. To that end, the Commission should ensure that it does not rely much on the jurisprudence of tribunals mandated to settle specific disputes.

Unfortunately access to State practice is not free from difficulties. It happens rarely that all States systematically compile and publish their practice of international law in one of the official languages of the United Nations. We are definitely aware that all States do not have the expertise and the adequate capacity necessary to make their practice known. Some valuable efforts have been made in areas such as fight against corruption.

If it is true that international custom mainly results from the general practice of states accepted as law, some of the resolutions of the General Assembly of the United Nations can also contribute to its formation. Therefore, the yearly repetition of similar resolutions addressing the issues repeatedly over time which are adopted with a large majority has to be considered as such. The same applies to those resolutions of General Assembly to which they are given the status of "declaration".

Mr. Chairman,

The Commission should avoid according same value to the practice of non-state actors, regardless of the importance of their mission, and a direct role in the formation of custom. Their contribution to the identification of State practice in the framework of the work of the group of experts, by itself and without the approval of States, cannot be considered as proof of the existence of the rule of customary international law. However, one cannot deny the role that these actors have been playing to forge and influence State practice.

Chapter VIII

"Provisional application of treaties"

Mr. Chairman,

I would like to congratulate Mr. Juan Manuel Gómez-Robledo, Special Rapporteur on the topic for his first report.

Some doubts have to be raised with regard to the assessment that provisional application of treaties are consistent with the definitive commitment of States pertinent to the constitutional rules. This commitment has to rely on the agreement of the States parties and is justified by the intention of the parties to rapidly achieve the purpose envisaged by the agreement. Some treaties, particularly those including rights and obligations for individuals, cannot be subject to provisional application. In fact, to the extent that it produces obligations identical to those resulting from its entry into force, the decision to put an end to its application brings about complex situations for the latter.

Similarly, as the special Rapporteur noted, provisions creating monitoring mechanisms cannot be subject to provisional application. Only on exceptional basis, States may subject themselves to such mechanisms as measures of confidence-building and good will. We believe that, from a wide range of points of view, the time was not ripe enough for the Commission to consider this topic.

Chapter IX

"Protection of the environment in relation to armed conflicts"

Mr. Chairman,

My delegation would like to welcome the decision of the Commission to include this topic in its programme of work. We also congratulate Ms. Marie G. Jacobsson, for her appointment as Special Rapporteur for the topic.

We support the proposition made by the special Rapporteur to address the topic more from a temporal perspective than from the point of view of international humanitarian law. In fact, rules of international humanitarian law concerning the protection of environment during international armed conflicts, most of which are also applicable to non-international armed conflicts, are sufficiently developed. By contrast, this is not the case for the provisions of international law concerning applicable rules in the peace time in order to prevent environmental disasters during possible outbreak of an armed conflict. To this effect, it would be absolutely wise that international law envisages provisions to encourage States to move military objectives, to the extent possible, far from ecologically fragile zones.

The Commission should specially focus on the measures that States, particularly those engaged in armed conflicts, have to take, once the hostile activity ended, in order to rehabilitate the environment. The question of environmental consequences of war is one that has interested States since the First World War, but no real measure has been taken to resolve the problem ever since. The Protocol to the Agreement of 27 January 1973 signed in Paris on "Removal, Permanent Deactivation or Destruction of Mines in Territorial Waters" had, unfortunately, a very limited scope.

The topic has been captured by the United Nations in the 1990s and was followed by the report prepared by the UN Secretary-General of 27 July 1997 (A/32/187) which emphasizes the importance of the matter and particularly addresses the pollution caused by conventional or chemical weapons remained unexploded, lost, stockpiled or immersed. The General Assembly has in turn addressed the issue by adoption of the resolution 17 December 1981 whereby the General Assembly expresses regret that no real measure has been taken to resolve this recurrent issue. Iran, as victim of an aggression with vast parts of its territory still bearing the environmental scars as a result of the operations carried out by the aggressor, welcomes this initiative.

In our view, the Commission should address, among other things, issues related to demining. It is the duty of the States or non-state actors that have undertaken the mining to communicate, once the active hostility ended and within the framework of ceasefire agreements, the information they posses on the position of planted mines. Similarly, solutions should be sought to rehabilitate, where appropriate, refugee camps whose negative impact on the environment is sometimes very serious.

Chapter X

"The obligation to extradite or prosecute (*aut dedere aut judicare*)"

Mr. Chairman,

I would like to recognize the efforts of the Commission on this topic.

It should be reminded that the mandate primarily given to the International Law Commission was to determine the legal nature of the maxim *aut dedere aut judicare*. Is it based on a customary rule of law or its foundation is solely conventional? The last Commission devoted his efforts to the study of State practice in this regard and could not identify a single case where a State has proceeded to extradite a person to the territory of another State in the absence of a treaty obligation or an instrument of extradition binding the two States.

It can be argued that article 10 of the draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996 stipulating that the crimes listed by the Code to be considered to appear in an extradition treaty, proves that the maxim has had a customary basis ever since. Nevertheless, the same article stipulates that States shall engage to include these crimes in all types of extradition instruments, agreed by them.

However, in the judgment rendered by the International Court of Justice on the *Questions relating to the Obligation to Prosecute or Extradite (Belgium V. Senegal)* although the arrest warrant issued by the latter derived from the violation of provisions of the Convention against Torture and crimes against humanity committed, none of the documents submitted by Belgium indicated that Senegal was to exercise its jurisdiction over this crime. The only obligations mentioned in the diplomatic exchanges between the parties were those arising under the Convention against Torture (para. 54), and proves the fact that there was no customary obligation

incumbent upon Senegal to extradite or try an individual suspected of having committed such a crime.

According to the Court, "the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct" from the case (Para. 54). That is the reason why the Court has not found it necessary to answer this question. The usefulness of any deeper study of the judgment of this case as proposed by the Working Group and whether under these circumstances it could further clarify this question and prove that the maxim has a customary basis, remains unclear.

As the Working Group has pointed out in its report (A/68/10, Annex. A), it is true that the conventional regime presents important loopholes with regard to the obligation to extradite or prosecute. There should be some levels of clarity in this regard. We do not think that it would be wise to give such a mandate to the Commission. It seems to us, it is the right time to clearly comment on the future of the work of the International Law Commission in this regard.

Regarding the relationship between obligation to extradite or prosecute and universal jurisdiction, we believe there is a substantial difference between the two concepts, the second being of procedural nature. The discussions in the Sixth Committee on the item "The scope and application of the principle of universal jurisdiction" should not affect the possible ILC's decision on the topic of "The obligation to extradite or prosecute", since it is not likely that the Sixth Committee would be opted for referring the former to the ILC. Moreover, we do not deem it advisable to link the two subjects.

Chapter XI
"The Most-Favoured-Nation clause"

Mr. Chairman,

Regarding the topic "The Most-Favoured-Nation clause", the question whether a Most-Favored Nation clause could include clauses of settlement of disputes depends on whether these clauses are considered like other clauses of an instrument. It does not seem that a reservation made to the provision of a treaty on the settlement of disputes with regard to the interpretation and implementation of its provisions would be contrary to its object and purpose of this treaty. This would not definitely be the case where a treaty has been negotiated with a view to settle the existing disputes between the States or disputes that are likely to exist in the future and where the treaty has envisaged certain procedures of dispute settlement to that end. Thus, we do believe that the Most-Favoured-Nation Clause does not cover clauses of settlement of disputes, unless such a clause has been included in a treaty devoted exclusively to the settlement of disputes. Our position is based on the reasoning followed by the ICJ in its advisory opinion rendered in 1951 in response to the question concerning reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

Chapter XII
"Other decisions and conclusions of the Commission"

Mr. Chairman,

We are of the opinion that currently there is no specific instrument to combat crimes against humanity similar to those elaborated by the international community for the crime of genocide and war crimes. However, crimes against humanity is defined by the great number of international instruments such as The Rome Statute of the International Criminal Court. This definition has been incorporated in the legislation of numerous States granting their tribunals competence to prosecute persons suspected of committing this crime. Therefore, it does not seem that in terms of the definition of the crime and its criminalization at the international and national levels, there is a legal loophole to be filled through the adoption of a new international instrument.

It is clearly true that the criminalization at the national level is far from being universal and that some States do not have yet the relevant legislation. Among these states who do not yet have domestic legislation for such crimes, some are States parties to the Rome Statue. These States have the interest to take the necessary measures to fill this gap, without which they would not be able to implement the principle of complementarity as provided as an important pillar of the Statute. Contrary to what the annex suggests, it is not through the adoption of national legislation in this field that States will be encouraged to accede to the Statute, but it is more due to the ability to exercise their rights with regard to the principle of complementarity that States should have national legislation.

Moreover, it is not established that an effective fight against impunity with regard to the crime against humanity requires adoption of a new legal instrument. It seems to us that the existing legal arsenal, namely the exercise of the universal jurisdiction by internal tribunals and the jurisdiction of the International Criminal Court, are sufficient to lead the fight against impunity to this crime. In this case, like the crime of genocide and war crimes, what seems to be missing is the political will to accept the legal mechanisms available to States. It remains for the international community to keep calling upon States to criminalize international crimes, including crimes against humanity, in their national legislation, and adhere to the Rome Statute of the ICC.

As for the existing gaps in the Statute and the usefulness of the proposed draft articles, we believe that it is mainly legal cooperation between States, bilaterally or regionally, that can fill the gap. Therefore, we are of the opinion that the inclusion of this topic in the long-term program of the International Law Commission does not respond to the criterion that this body has set for the selection of topics in 1998.

Finally, for the same reason we believe that the inclusion of the new topic 'Protection of atmosphere' in the long-term program of the Commission does not match with those criterion and also since the Commission has imposed to the mandate of the Special Rapporteur for this topic a long list of conditionalities and limitations.

I thank you.