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

Statement by

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Report of the International Law Commission
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Chapters VI, VII, VIII:
Identification of Customary International Law
Crimes Against Humanity
Subsequent Agreements and Subsequent Practice
in Relation to the Interpretation of Treaties

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In the name of God, the Compassionate the Merciful

Mr. Chairman

My delegation would like to express its appreciation to Mr. Michael Wood, the Special Rapporteur, for the third report on the " Identification of Customary International Law".

The Islamic Republic of Iran believes that consideration of the customary international law by the Commission should be based on the centrality of states, meaning that the general practice of States as main actors in international relations constitutes the main criteria in identification of customary international law. Decisions of the international courts and tribunals and the writings of publicists are subsidiary means as stipulated in article 38 of the statute of ICJ. With respect to international organizations, acknowledging their important role in formation of customary international law on their specialized fields, we underline that in formation and identification of customary international law, their role should be regarded in light of the centrality of States. *A priori*, action exercised by non-governmental organizations cannot be qualified as practice reliable for formation and identification of

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customary international law. However their role in endorsement of customary international law could not be denied.

Regarding the question of inaction, my delegation believes that the inaction of states in respect of a violation of a rule of international law cannot be seen as relevant practice in formation of customary international law, in contradiction with the existing rule. In other words, inaction, which almost inclined with political considerations shall not prejudice the validity and value of existing rule. For example, in the recent years, we have witnessed numerous instances of threat or use of force by a limited number of States, in defiance to the UN Charter. It should be emphasized that according to paragraph 4 of article 2 of the UN Charter threat of force categorizes with the same level as use of force and prohibited. Moreover, in consideration of the role of inaction in formation of customary international law, the hierarchy of international norms should be taken into account. Particularly, inaction shall not effect the peremptory norm of international law such as threat or use of force.

On whether a rule of customary international law has emerged when a treaty is met with quasi-universal participation, my delegation believes that the conducts of States parties, cannot *per se* constitute sufficient practice for formation of customary international law. In this context, we concur with the Special Rapporteur that "the concordance of even a considerable number of treaties *per se* constitutes neither sufficient evidence nor even a sufficient presumption that the international community as a whole considers such treaties as evidence of general customary law".

Mr. Chairman,

In relation to the nature of provisions included in the existing quasi universal treaties, we are of the view that the mere universality, should not be considered as a criteria for identification of customary international law. The Commission should define the criteria and circumstances under which these provisions crystallize into a rule of customary international law, for the states not parties to those instruments. For instance, transit passage through strait used for international navigation, as reflected in the UNCLOS, which is considered as a progressive development of international law; yet, it is not considered as a rule of customary international law, despite of worldwide acceptance of the UNCLOS. The practice of non states parties remain the essential condition in this regard.

With respect to contribution of the resolutions adopted by international organizations or by international conferences in formation of customary international law, we have to reiterate that the resolutions by themselves cannot create customary international law without establishment of the two essential elements, i.e. State practice and *opinio juris*. In this regard, we concur with the Special Rapporteur that UNGA (and other international organizations) are political organs in which decisions of the member States are political rather than acts carrying legal significance. As ICJ in its advisory opinion in 1996 on *the legality of threat or use of nuclear weapons* clarified, "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To

establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption" (Para. 70).

The other issue that needs further consideration is the decisions of the national courts. Wide gaps between different legal systems, namely Common Law and Romano-German systems, and their specific characteristics causes national courts to have a particular approach to international law, with some courts hardly touching upon issues of an international nature. Thus, decisions of national courts of the limited number of States, cannot contribute to generally accepted practice in the formation of customary international law.

The Islamic Republic of Iran supports the inclusion of the persistent objector rule in the work of the Commission as one of the main institutions in the process of formation of customary international law. It is one of the manifestations of principle of equal sovereignty, and could be considered as a fundamental right of all States, without any distinction, to exclude themselves from the scope of a specific emerging rule. The persistent objector rule is not only one of the elements of the centrality of State in the process of formation of customary international law, but also a natural consequence of the essentially consensual nature of customary international law.

Crimes Against Humanity

Mr. Chairman,

Turning to the topic "crimes against humanity", the Islamic Republic of Iran is of the view that the idea of drafting a new convention on crimes against humanity by the Commission, is premature and due to many reasons, still needs serious consideration. First of all, crimes against humanity as a crime under international law has been defined clearly in numerous international instruments since the World War II, the most important of which being the Statute of the International Criminal Court (ICC).

Reviewing of the first report of the Special Rapporteur and the proposed draft articles makes it obvious that no new provisions are to be codified or developed by the Commission on this topic. In this respect, it is enough to consider the fact that virtually all the States which addressed the issue before the Sixth Committee maintained that, the Commission should not adopt a definition on "crimes against humanity" that differs from article 7 of the Rome Statute. Moreover, several States have criminalized crimes against humanity in their national legislations, which provides a solid base in persecution of perpetrators of the crime against humanity worldwide.

Furthermore, under the principle of *Aut dedere aut judicare* (which has been included in several international instruments), bilateral judicial assistance agreements and other international instruments referred to by the Special Rapporteur in the first report, there is sufficient legal basis as to the prevention and punishment of crimes against humanity.

In this regard, my delegation would like to note that the solution to addressing the existing insufficiencies in the implementation of some provisions on crimes against humanity

is not to prepare a new convention; rather, it would be more reasonable to seek the reasons and motives of non-implementation and to propose some methods to eliminate them.

Furthermore, one may conclude that consideration of a new convention on a topic of international law parallel to the existing instruments cannot, by itself, contribute to its strengthening, it may rather lead to fragmentation of international law and would not fill any legal lacunae in international legal order. For this reason we have not yet convinced that drafting a new convention could bring any added value to the existing international legal framework in this regard.

Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties

Mr. Chairman,

On the topic "subsequent agreements and subsequent practice in relation to the interpretation of treaties", the Islamic Republic of Iran believes that the work of the Commission on this topic should not exceed the limits of principles elaborated in Articles 31 to 33 of the 1969 Vienna Convention on the Law of the Treaties, therefore, it should be consistent with the object and purpose of the 1969 Convention.

As regards the subsequent practice of the Parties to constituent instruments of international organizations under article 31 (3) (b), it should be borne in mind that practice of the Parties as relevant practice for the purpose of interpretation of such instruments Is limited to circumstances in which the Parties knowingly demonstrate their intention as to interpretation. In other words, interpretation of the instrument should be the very intent of the Parties thereto.

The recommendations adopted by international organizations may also be relevant under certain conditions for interpretation of the provisions of an given instrument. As the ICJ in Para. 46 of *whaling in the Antarctic* case dated 31 March 2014 stipulated:, the recommendations must be adopted by consensus or by a unanimous vote, to play such a role. Under Article 31 (3) (b) of the 1969 Convention, only agreements and practice can be deemed relevant in terms of interpretation of a constituent instrument by the Parties when decisions are taken unanimously or by consensus. The same applies to bilateral or regional agreements or practices. Thus, agreements or practices directed by a limited number of Parties, cannot be regarded as relevant conduct for interpretation of instruments.

In addition, subsequent agreements under article 31 (3) (a) as a means of interpretation of constituent instruments of international organizations is subject to the relevant provisions enshrined in the instrument as elaborated in the Articles 39-41 of the 1969 Vienna Convention on the Law of Treaties.

It goes without saying that consideration of the practice demonstrated by an organ of an international organization as a means of interpretation of its constituent instrument depends upon whether all Member States are unanimously involved in the practice concerned. It is

quite reasonable that the function of an organ of an international organization which does not include all members should not be regarded as relevant for interpretation of its constituent instruments.

Regarding the organization's "own practice " upon the adoption of its internal rules despite the opposition of certain Member States, we believe that these types of acts neither constitute practice nor establish agreements between the parties regarding the interpretation of certain instruments.

To sum up, we believe that a proper interpretation of constituent instruments of international organizations, should be coupled with consideration not only of the intention and will of negotiators of the original instrument but also of its actual practice and the intentions of all Member States to modify original mandate.

I thank you Mr. Chairman.