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*(translation)*

**Statement by Mr. XU Hong**

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**At the 72<sup>nd</sup> Session of the UN General Assembly**

*On Agenda Item 81*

**Report of the International Law Commission on the work of its 69th  
session**

**Cluster 1: Chapters I, II, III, IV, V and XI**

*New York, 23 October 2017*

Mr. Chairman,

As this is the first time I take the floor at the Six Committee during the 72nd session of the General Assembly as the representative of China, please allow me to congratulate you on your election as the Chairman. I am confident that you will steer this session to a successful conclusion. I would also like to thank the International Law Commission for the introduction to the report on the work of its 69th session, which provides a very good basis for the discussions among member states.

We have noted that at the 69th session of the Commission, important progress has been made on several topics, and some other developments have attracted wide attention. The Chinese delegation applauds the hard work of all ILC members, and will continue to support the work of the Commission by providing constructive comments.

Mr. Chairman,

I will begin by presenting China's views on "**Crimes against humanity**". My delegation appreciates the efforts of the Commission and the Special Rapporteur on this topic. In terms of the overall direction of the topic, China endorses the importance accorded to the prevention and punishment of crimes against humanity. We would like to make the following comments on the draft articles as contained in the report.

First, many provisions of the draft articles lack empirical analysis. They derive mostly from analogous provisions of existing international conventions for combating international crimes, and rely primarily on the practice of international criminal justice organs without a comprehensive review of the existing practice and *opinio juris* of States. For instance, provisions relating to the liability of legal persons, extradition and mutual legal assistance, as well as protection of the rights and interests of victims and witnesses are not backed by State practice.

Secondly, when explaining the draft preambular paragraph 3, which states that “the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)”, the commentary cites as evidence the language contained in the commentary on the Commission’s draft articles on responsibility of States for internationally wrongful acts and judgments of the ICJ, the ICTY, the Inter-American Court of Human Rights and the European Court of Human Rights. However, those references and judgments are mere general comments without detailed analysis of relevant practice and *opinio juris* of States. As such, they can hardly prove that the prohibition of crimes against humanity has satisfied the requirement for *jus cogens* set forth in Article 53 of the Vienna Convention on the Law of Treaties, namely “a norm accepted and recognized by the international community of States as a whole”. We are of the view that since “peremptory norms of general international law (*jus cogens*)” is an ongoing topic of the Commission, and the practice and *opinio juris* of States concerning such important issues as the identification and effects of *jus cogens* remain unclear in some aspects, the need for the draft articles to address the issue of *jus cogens* character warrants further studies.

Thirdly, with respect to the definition of crimes against humanity as contained in draft article 2, and the detachment of the traditional element of “committed in time of armed conflict” from the said crimes in draft article 3, we reiterate our reservation expressed at previous sessions.

Fourthly, with respect to paragraph 8 of draft article 6 concerning the liability of legal persons, we suggest further discussion as to the necessity and reasonableness of this provision. Paragraph 8 draws on the provisions on the liability of legal persons contained in the Convention against Corruption, the Convention against Transnational Organized Crimes, the Optional Protocol to the CRC that prohibits the sale of children and the International Convention for the Suppression of the Financing of Terrorism. While in reality, there are indeed cases in which the afore-mentioned crimes

are committed by legal persons, it should be highlighted that there are major differences between those acts and crimes against humanity in terms of nature and elements. The attached commentary falls short of being convincing about the likelihood of actual participation of legal persons in the proscribed acts, and the necessity for criminalization under domestic law. This issue is better left to the autonomous decision of States.

Mr. Chairman,

With respect to “**Provisional application of treaties**”, the Commission adopted at this year’s session the draft guidelines 1 to 11 and the commentaries thereto. The Chinese delegation commends the Commission for its progress on this topic. We have noted that draft guideline 6 establishes a “default rule”, namely the provisional application of a treaty produces the same legal effect as if the treaty were in force, unless the parties indicate to the contrary. As this formulation represents a major development of the rules governing the provisional application of treaties as defined by the Vienna Convention on the Law of Treaties, the Commission should proceed with utmost caution. We believe that to determine whether the provisional application of a treaty equals the coming into force of the treaty, the key is to ascertain the real intent of the parties and comprehensively examine relevant practices of States, including any possible exceptions.

Regarding the commentary on draft article 6, we have noted that it seems to suggest that the legal effect of provisional application of a treaty differs from that of the treaty’s being in force only in cases of termination or suspension of the treaty. We would like the Commission to clarify whether difference in legal effects exists in cases of reservation to treaties, state succession or other special situations.

Thank you, Mr. Chairman.