Islamic Republic of
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Statement by
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before
Sixth Committee of the 72nd Session of the UN GA
On Report of the International Law Commission on the Work of its sixty – ninth session (agenda item 81)
Cluster I (Chapters IV, V and XI) Crimes against Humanity, Provisional Application of Treaties, Other decisions and conclusions of the Commission
New York, 25 October 2017

In the name of God, the Compassionate, the Merciful

Mr. Chairman,

First of all, I would like to thank the Chairman of the International Law Commission for his presentation on the work of the ILC of its Sixty ninth sessions, which shed a bright light on the detailed annual report contained in document A/72/10. I should also thank the Members of the Commission for their hard work in the past year.

Our initial remarks at this meeting will be on the topics under cluster 1, namely "Crimes against Humanity", "Temporary Application of Treaties" and "Other decisions and conclusions of the Commission".

Mr. Chairman,

With regard to the "**Crimes against Humanity**", we thank the Special Rapporteur, Mr. Sean Murphy, for his third report and would like to highlight some remarks on this topic:

First, my delegation believes that the work of the Commission on this topic should be fully in conformity with and not deviate from the Statute of the International Criminal Court, to the exact extent that it deals with the crimes against humanity. Thus, re-producing article 7 of the Rome Statute in the draft article 3, which is a welcome inclusion, should be exclusively confined to this crime and not be mixed and connected with other crimes under the jurisdiction of the ICC. To elaborate this point more, I refer to the last part of paragraph 1(h), article 7, of the Rome Statute which makes reference to "any crime within the jurisdiction of the Court". In the draft

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articles, however, this phrase has been replaced with "the crime of genocide and war crimes". It should be recalled that the Rome Statute has established a Criminal Court with different types of crimes under its jurisdiction namely, crimes against humanity, genocide, war crimes and crime of aggression, while this is not the case for the draft articles under consideration dealing with crimes against humanity only. This is why we are not satisfied, from legal standpoint, with the references made to the crimes of genocide and war crimes in paragraph 1(h) draft article 3. This reflection is without prejudice to the basic position and observation of the Islamic Republic of Iran with regard to some elements of the crimes against humanity as incorporated in article 7 of the Rome Statute itself.

Second, Codification should be based on a thorough review of State practice. In the Special Rapporteur's report and the draft articles, significant attention has been given to the practice of international judicial organs, whereas, by contrast, little reference made to the general practice and *opinio juris* of States, bearing in mind that the main addressees of this draft articles would be the states. For instance, criminalization under national law in draft article 6, extradition and mutual legal assistance, protection of the rights and interests of victims and witnesses as well as the omission of the traditional qualifier "in time of war" i.e. *nexus requirement* in draft article 2, have deviated from rules of customary international law, failing to consider the State practice.

Third, While the proposed draft articles are largely modeled after United Nations Convention against Corruption, it should be borne in mind that the widespread adherence of States to the latter hardly justifies the Special Rapporteur's approach, since the two subject matters deal with two distinct sets of crimes much different in nature and content.

Fourth, by inclusion of paragraph 4 in the draft article 3, the definition of crimes against humanity contained in this draft article, differs from the one set out in article 7 of the Rome Statute too. According to this proposed paragraph, "this draft article is without prejudice to any broader definition provided for in any international instrument or national law". We have serious doubt whether this paragraph serves the purpose of the topic under consideration, namely harmonization of national laws or it may pave the way for further fragmentation of international law.

Fifth, the formulation of draft article 2, according to which crimes against humanity are "crimes under international law" is, to some extent, confusing. Other "crimes under international law", such as transnational organized crime, corruption, etc. have treaty-based definition and have not been amounted to the customary-based definition and it is for that reason that the expressions "the most serious crimes of international concern" and "the most serious crimes of concern to the international community" have been deployed in the Rome Statute. This formula is not even consistent with the one proposed in the fourth preambular paragraph of the draft articles, which states that crimes against humanity, "are among the most serious crimes of concern to the international community as a whole".

Sixth, with regard to the third paragraph of proposed preamble, we maintain that the "peremptory norms of general international law (*Jus cogens*)" is still an ongoing topic of the Commission, and the practice and *opinio Juris* of States concerning such paramount matter including the identification of Jus cogens and its effects remain unclear in some aspects. Thus, the

necessity and the need for the draft articles to address the issue of Jus cogens character merits further studies and works.

Seventh, the obligation of States to prevent crimes against humanity, as currently drafted, is too broad and leaves very less freedom for the national systems in terms of administrative and procedural matters. More importantly, paragraph 1 (b) of the draft article 4 provides that States are under an obligation to cooperate, as appropriate, with "other organizations". According to the commentary, "other organizations" includes non-governmental organizations. However, the commentary has not addressed the legal basis of such an obligation, if any, as well as the practice of States in that respect. The Commission should therefore re-consider this issue with much caution since it seems inappropriate to impose such an obligation upon States.

Eighth, considering the requirement of double criminality under the laws of both the requesting and requested States of the offence for which extradition is to be granted, we are not content with exclusion of the requirement of double criminality in the present work since it is a well-established principle in the area of extradition that is upheld by numerous international instruments, the most important one being the Statute of the International Criminal Court (ICC).

Ninth, with regard to inclusion of the term "membership of a particular social group" in draft article 13, paragraph 9 on the substantial grounds for refusal to extradite, we believe that the term would be subject to a wide range of divergent interpretations that will impede cooperation for extradition. Thus, the Commission had better delete it from the article to make it clearer and more robust.

Tenth, the rationale behind the idea of devising a monitoring mechanism or arrangements is missing since we are dealing with a legal concept, i.e. crimes against humanity, and the most similar conventions dealing with genocide and war crimes do not have such mechanism either. We strongly believe that qualification of acts amounting to crimes against humanity is best to be carried out by an international organ of a judicial nature and that judicial decisions are only relevant when rendered by a competent judicial organ.

Eleventh, consistent with the approach taken in the report concerning the issue of amnesties under national law, my delegation believes that prohibition on amnesty is not established as a rule of customary international law and it is not reflected in international treaties addressing crimes either; Nonetheless, resort to amnesty can be at times regarded as a practical solution to reconcile nation and guarantee stability and tranquility mainly in post-conflict situations.

Twelfth, with respect to paragraph 8 of draft article 6 concerning the liability of legal persons, we are reluctant to go along with this substantial change and addition to the very well-established principle of "individual criminal responsibility" crystalized in article 25 of the ICC Statute. Moreover, there are major differences in terms of nature and elements between crimes against humanity and other acts referred to as a basis for this provision. This issue is better left to the national law and decision of States.

In sum and based on the points just alluded, we are not convinced, at this juncture, by the idea of a new convention on crimes against humanity. It goes without saying that the deficiency in implementing the present instruments on the matter would not be resolved with codification of the

same provisions in a new instrument or even expanding the concept and changing its nature and scope of application. Accordingly, we recommend the Commission to opt for "draft guidelines" as a proper form for the final outcome of the work.

Mr. Chairman,

Turning to the topic: "**Provisional Application of Treaties**", my delegation appreciates the work undertaken by the Special Rapporteur. We are confident that the principle of consent prevailing in international law and particularly law of treaties remain to be the core element of present topic. We concur with proposing draft guidelines as the proper form for the ongoing work, since it demonstrates the flexible and non-binding nature of proposed provisions. We also maintain that provisional application would not serve as a basis for restricting States' rights with regard to their future conduct in relation to the treaty that might be provisionally applied.

The exceptional nature of the provisional application of treaties and variety of states practice as a result of different domestic laws regarding the issue require a balance approach on the need for early meeting of treaty obligations and the national requirements of the states concerned. In this regard, the rarity of internal laws which provide legal bases for provisional application of treaties should be taking into consideration.

Considering draft guideline 4 regarding the forms of agreement on provisional application and specifically 4(b), the inclusion of resolutions as means or arrangement of agreement on provisional application of treaties by international organizations, give rise to doubt, considering the non-binding character of the most of the resolutions of international organization as well as the difficulties arising from the resolutions that are adopted by vote and thus, do not reflect the consent of all the member states. Foreseeing such scenario may jeopardize the well-established international law of treaties.

Mr. Chairman,

The present guidelines along with their commentaries do not address some of the problematic issues including the formulation of reservations in the case of provisional application, while according to article 19 of the 1969 Vienna convention, a state may make reservation when signing, ratifying, accepting, approving or acceding to a treaty. Thus, a State's provisional application of a treaty does not preclude its right to enter reservations to that treaty.

Also the present work has not addressed the differences between the scope and subject-matters of treaties. As a case in point, a distinction should be drawn between multilateral treaties vis-à-vis bilateral treaties, as, in our view, the latter could not, because of its nature and parties, be provisionally applied. In other words, the basic principle of equality of states and the reciprocity of the rights and obligations as a result of their bilateral treaties and relations, leave no logical reasoning to the temporary application of bilateral treaties.

At the same time, the legal regime and modalities for termination and suspension of provisional application do indeed require further clarification. In fact, it is doubtful whether all the elements of the Vienna Convention could be inferred by way of analogy for provisional application of treaties. Thus, we are in favor of a comprehensive study of the Vienna Convention

on the Law of Treaties in the context of provisional application to determine which provisions of the Vienna Convention apply to provisional application and which do not.

And finally on this topic, it is doubtful whether there are grounds in State practice for the full implementation of the international responsibility regime for breach of an obligation arising under all or part of a treaty applied provisionally, irrespective of the content of the provisions applied. In fact, since the raison d'être of the legal institution of the provisional application of treaties has been to ensure wider acceptance of the treaty in question by States in respect of which the treaty had not yet entered into force, a stricter interpretation of the rules of international responsibility in such cases could make some signatory States reluctant to have recourse to provisional application; though same States might otherwise prefer to provisionally apply the treaty in good faith and on a voluntary basis.

Mr. Chairman;

Under the topic **"Other decisions and conclusions of the Commission"**, at this stage, my delegation would like to present its comments on the ILC's decision to include a new topic on the agenda of the Commission namely "Evidence before International Courts and Tribunals". We express our position with regard to the other new topic of " General Principles of Law" at a later stage.

Concerning the topic "Evidence before International Courts and Tribunals", we thank Mr. Aniruddha Rajput for preparation of the syllabus. As was rightly reaffirmed by the Commission, before selecting new topics on its agenda, the ILC's recommendation at its fiftieth session in 1998 needs to be carefully observed. To that effect, the new topics should reflect the needs of States in respect of the progressive development and codification of international law. The second criterion requires the selected topic to be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification and should be concrete and feasible for progressive development and codification. Thus, one may wonder what is meant by State practice when it comes to the issue of evidence before international courts and tribunals unless you consider jurisprudence to be as evolving as State practice, and as such, contributory to progressive development of international law.

Moreover, it is not clear that unifying evidences before different courts with diverse jurisdiction and structure would be useful at all or it may even lead to further fragmentation. As we know, every international or regional court has its own rules of procedure and functions based on the jurisdiction, competence and composition it has. In every specific case, the Judge should come up with a profound conviction as a result of the way he or she examine the evidences put forward. Another concern is also raised as to the final outcome of the proposed topic, which will most likely serve as a guide for international courts and tribunals and would be of little relevance, if any, to States and State practice.

Thank you Mr. Chairman