STATEMENT BY TURKEY AT THE SIXTH COMMITTEE
AGENDA ITEM 81
REPORT OF THE INTERNATIONAL LAW COMMISSION
(Cluster I)
(25 OCTOBER 2017)

Mr. Chairman,

It is a great pleasure for me to address the Sixth Committee for the first time. I would like to seize this opportunity to express our thanks to the Chairperson of the Commission for the eloquent presentation of the Report.

I also wish to offer our sincere appreciation and gratitude to the Special Rapporteurs for their comprehensive contributions to the Commission's work. I would like to address three topics contained in Cluster I of the Report, namely crimes against humanity, provisional application of treaties and finally other decisions and conclusions.

Chapter IV
(Crimes against humanity)

Mr. Chairman,

I would like to turn to the topic of "*Crimes against humanity*". At the outset, my Delegation commends the Commission for the adoption of the draft articles and commentaries thereto.

Albeit the concept of crimes against humanity originates from international law, it lacks global agreed rules and standards, unlike other crimes under international law. As noted in the report there is no global convention dedicated to preventing and punishing crimes aganist humanity and promoting inter-state cooperation in this regard, this legal vacuum should properly be addressed.

With this understanding Turkey, like many other countries, has already codified crimes against humanity in its national law and supports international

efforts to tackle such crimes. Nevertheless, we wish to underline that the proposed rules, concepts and mechanisms should be established with utmost diligence, in an unhurried manner and full clarity. Crimes against humanity have highly political natureas well, by definition involving state officials. It poses the risk to be exploited for political reasons. This risk is especially embedded in draft article 7 ("*Establishment of national jurisdiction"*) which encourages states to exercise extra-territorial jurisdiction. We are of the view that the provision should further be analyzed and prudently drafted.

As the international tribunal decisions cited in the commentary cleary indicate and as expressed by the members of the Commission, the definition and components of crimes against humanity are complex in many dimensions. Moreover its key requirements, such as *"widespread attack"*, *"systematic attack", "attack directed against any civilian population"* and *"organizational policy to commit such an attack"* that aredealt with in draft article 3, as well as the criteria governing responsibility of military commanders and superiors, contained in draft article 6, are ambiguous. Furthermore, as pointed out in paragraph 26 of the commentary on draft article 3, one of those terms could be perceived synonymously with another even by judicial authorities. As underlined by the Commission the case-law of the International Criminal Court is also evolving in this respect. Hence we encourage further debate on the fundamental issues prior to other mainly procedurel aspects, such as draft article 14 and draft annex to it, dealing with mutual legal assistance.

Mr. Chairman,

It is argued that a major deviation from the definition in the Rome Statute may cause a dilemma for the state parties of the Statute. However, one should also bear in mind disregarding non-state parties' concerns may also lead to that only state parties to the Rome Statute embrace those rules, but others opt out of it. In order to establish broad-based rules, we suggest further discussion as to more elucidation of the concepts.

As Turkey stated during the preparatory work of the Rome Statute previously, we support upholding the "conjunction" between the terms *"widespread attack"* and *"systematic attack"*. This is because of our concern about over-inclusiveness. It is mentioned in paragraph 11 of the commentary of draft article 3 that the definition of *"attack directed against any civilian population"* is added to article 7, paragraph 2 (a), of the Rome Statute with a view to satisfying similar concerns about broadness.However, we still think that this additional definition does not provide absolute clarity. For further delimitation of the scope, and stronger emphasis against ambiguity, it may be preferrable that the requirements of *"widepread"* and *"systematic"* are accepted

as two distinct elements, both of which must be met, rather than alternative to one another for the following reasons:

The term "*any population*" in the requirement of *"attack directed against any population"* is defined in the commentary as involving multiple victims. However, this "multiplicity" does not certainly denotes a large number on its own, that is to say more than one victim may be necessary to satisfy the criterion. Although it may not be viable to set a spesific numerical threshold of victims,one should also bear in mind that such an attack must be considerably serious and must be of great magnitude, different from individiual narrow scale cases. This massiveness of atrocity can only be evaluated objectively with the number of affected people or the largeness of targeted area, either of which refers to *"widespread*".

Otherwise, accepting the terms *widesprad"* and *"systematic"* as disjunctive would allow two elements *"systematic attack (1) directed against any civilian population (2)",* without*"widespread requirement",* to be sufficient for the satisfaction of the criteria. However *"a systematic attack"* upon *"an organizational policy"* against a small group (any population) in a narrow area should not be deemed as crimes against humanity, as it would manifestly contradict the severe nature requirement, which, although not explicitly stated in the definition, is inherent in the concept of crimes against humanity.

Mr. Chairman,

We have already shared our doubts and hesitations about the concept of *jus cogens* earlier in our statements with regard to the Commission's topic of peremptory norms of general international law. Corollary we wish to raise some doubts, in particular on the third preambular paragraph *"recognizing that crimes against humanity is a peremptory norm of general international law."*

We believe that the incorporation of such provision and reasoning explained in paragraph 4 of the commentary, which is based on the first report of the Special Rapporteur Mr. Sean Murphy, do not coincide with the level of common understanding of international community on *jus cogens* in genaral, and also in particular the Commission's ongoing work on the topic of peremptory norms. We are of the view that the preambular paragraph must be treated with caution and requires further consideration, if not deleted.

Mr. Chairman,

We also think it is contradictory to refer only to the Vienna Convention on the Law of Treaties and is questionable to select those provided therein as sole

criteria. Whereas it is claimed that some rules of international law are accepted as unexceptionally binding by all states, paradoxically the Vienna Convention on the Law of Treaty itself selected as the basis identifying those binding peremptory norms, are not accepted by all states including Turkey. Moreover requirements of recognition and acceptance provided in the theVienna Convention on the Law of Treaties also necessitate further requirements and definitions on which, however, the Convention is silent. To tackle this vagueness, some further evidences not mentioned in the Vienna Convention are assessed in the Commission's draft conclusion 9 on peremptory norms of general international law. However, the explanation *per se* in the commentary of the third preambular paragragh on crimes against humanity does not fullfil the criteria foreseen in the draft conclusion 9 (earlier treaties, resolutions by international organizations, public statements on behalf of states etc.).

With respect to torture "justification" in the commentary as sole basis for the addition of third preambular paragraph, we would like to draw your attention to that there is no similar provision even for the torture in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Mr. Chairman,

Draft Article 3, paragraph 1(h) is a verbatim text of Article 7 of the Rome Statute. However, unlike the Rome Statute having its own definition on genocide (Article 6) and war crimes (Article 8), there is no particular definition or reference in draft articles as to what is meant by "genocide" and "war crimes". In this context, for the avoidance of doubt, the Commission should consider making a definition or reference to other legal sourcesin the draft articles about genocide or war crimes.

With regard to liability of legal persons addressed in paragraph 8 of draft article 6, we are pleased to see incorporation into the draft articles, of modern, ever-increasing approach accepting liability of legal entities for criminal offences, which is also reflected in our national law. In this sense, we welcome the flexibility provided and embracement of divergent approaches within national legal systems as foreesen in draft Article 6.

Mr. Chairman,

As regards paragraph 3 of draft Article 12 concerning victims's right to obtain reparation, we welcome the discretion and flexibility provided by the word "as appropriate" for states in determination of forms of reparation without

limiting to certain types. On the other hand, we are of the view that the Article requires further clarification for the following reasons:

As opposed to the commentary in which it is explicitly said that states are the obligator to provide redress, we would like to draw your attention that there is no clear reference in the draft article itself to the state being responsible for damages.As a matter of fact, with regard to state liability for moral and material damage, we are of the opinon that since individiuals can only commit this crime, and be criminally responsible, the civil liability should in the first place be imposed on them. Accordingly, the provision should be redrafted as to give rise to a secondary obligation for States to make reparation if and when that the victims can not get reparations from the offender. In doing so, the Commission should also dwell on the question as which of the following states would be obliged to provide reparation, in case the offender of the crime who is national of one state commits the crime in a second state against nationals of third state. Secondly, this question is also needed to be answered lucidly that if a state exercised jurisdiction on the basis of the victims' nationality under draft article 7(1)(c) and tried an official of another state, would the former state itself make reparation to the victims, or elsewould award damages against the offender of crime, or the latter state whose official the offender is, according to paragraph 3 to draft article 12 ?

Mr. Chairman,

It is said in the general commentary that the articles such as "reservation, entry into force" are to be drafted depending on the decision by states to use draft articles as the basis of convention. In this sense we would like to recommend it that a non-retroactivity clause be inserted into the draft articles.

(Chapter V)
(Provisional Application of Treaties)

Mr. Chairman,

I would now like to turn to the subject of provisional application of treaties.

My delegation wishes to thank the Secretariat for the comprehensive memorandum reviewing State practice in respect of bilateral and multilateral treaties, deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application.

The memorandum provides a valuable source of information on provisional application of treaties. The analysis in the memorandum is based on over 400 bilateral and 40 multilateral treaties. We commend the Secretariat for the indepth review of the practice

As the Commission deferred the consideration of the memorandum to the next session we wish to share at this stage some of our preliminary observations relating the memorandum.

Mr. Chairman,

The memorandum indicates that the number of bilateral and multilateral treaties provisionally applied during the time period of the study undertaken by the Secretariat, is in reality higher than that available in the Treaty Collection. Given the numbers stated in the memorandum it is evident that provisional application practice in multilateral treaties is less frequent than that in bilateral treaties. It might be therefore useful to further consider whether a single set of guidelines for both bilateral and multilateral treaties is most approriate way to address the issue.

One of the purposes of the draft guidelines is to provide greater clarity in the terminology. Indeed, an extensive use of terms for provisional application has led to confusion in practice. In this regard in addition to the guidelines, the model clauses, to be provided by the Commission could also contribute to the consistent use of terms.

Mr. Chairman,

The main aim of the provisional application of treaties is to give immediate effect to all or some of the provisons of a treaty without waiting for the completion of all domestic and international requirements for its entry into force. As pointed out in the report, it is a mechanism that allows States and international organizations to give legal effect to a treaty or a part of treaty by applying its provisons in view of the necessity created by certain acts, events or situations before it had entered into force.

Although it can be a useful instrument of international treaty practice, it is after all for individual States to determine whether or not their legal systems allow provisional application. In this regard, the Commission should continue to bear in mind that some States, including Turkey, are not in a legal position to provisionally apply treaties due to their Constitutional provisions on treaties.

The Commission should thus confirm, either in the Guidelines or Commentaries, the right of States to apply a treaty provisionally within the limits of their domestic law. Provisional application of treaties is not only dependant on the provisions of the treaty. It is the States that will decide whether or not to apply treaties provisonally. The guidelines provisionally adopted by the Commission seem to deal with and reflect to a greater extent the treaty aspect of provisonal application. The inherent right of States to give consent to be bound by treaties and their modalites in respect of provisional application merits further analysis by the Commission.

(Chapter XI)
(Other decisions and conclusions of the Commission)

Mr. Chairman,

Before I conclude, allow me to express some remarks on the new topics **"General principles of law"** and "**Evidence before international courts and tribunals"**thatthe Commission decided to include in its long-term programme of work.

Mr. Chairman,

Every tribunal and court varies from each other in terms of jurisdiction, subject matter etc. Consequently the rules about the collecting and assesment of evidence, or power of the courts to make its own investigation, to appoint experts, the relationship and cooperation with states, possibility of coercive or other kinds of measures against states refusing to present evidence, set forth in the governing treaty or rules of procedure of the courts, are also distinguished from one another.
We think this difference is inevitable, because a large number of those rules are formed according to the specific needs, individual circumstances and/or priorities of the concerned states at the time of negotiation. Composition of original founding parties from civil or common law traditions also matters, since there are greatly divergent approaches between two legal traditions on the power of judges and standards of evidence. Furthermore, another subdivision with regard to evidence issue exists in civil and criminal law in terms of basic concepts as to the types of evidence, their weight in judgement, standards, or burden of proof, so on and so forth.

In that respect, we think the compilation of as many past and present methods employed by tribunals as possible, without favoring and indoctrinating some evidence approach could be useful.

Apart from this, in the light of the foregoing huge differences, it seems not to be viable to determine some ideal rules which can foresee and cover all future aspects, newly developed technics, subsequent priorities of states, and characteristics of all specialized courts, and it appears to be very far fetched, or to take a long time to reach an agreement on a standart body of law regarding evidence for the vast majority of states. Even if it is achieved to a considerable degree, at the end of the day specific needs and concrete conditions will shape the final scope of the content of a specific treaty of the international court or tribunal. In this regard, we are hesitant whether the topic could contribute towards avoidance of fragmentation of procedural law.

Therefore, we would like to recommend the Commission to channel its energy on more concrete rules. As a matter of fact we think the selection of the new topic “general principles of law”, one of the sources of international law stated in article 38 of the Statute of International Court of Justice, is praiseworthy.

As stated by Michael Wood in the first report on the formation and evidence of customary international law, to distinguish general principles of law from customary international law, or vice versa is important but not always clear in the case law or the literature. In this sense, we believe the work on general principles of law will also help demarcate the line between those two main sources of public international law, and will be contributory to the Commission’s earlier work on customary international law.

Secondly, working on this fundemental subject will also be relavant and helpful to other particular topics, which may be subsequently adressed, including the topic of evidence before tribunals. Indeed where there is lack of some explicit rules, many courts employ general principles of law in evidential manner. Lastly, since the evidence is also a procedural issue, it will also be better analyzed following the completion of the work on substantive matters like general principles of law.

Mr. Chairman

Next year, we will commemorate the seventieth anniversary of the International Law Commission. Allow me to share our enthusiasm about this landmark occasion. We take note with interest of the recommendations put forward by the Commission regarding the commemorate events.

Mr. Chairman,

Global prosperity is ensured in such an international order characterized by international peace and security, sustainable economic growth, and developlement. Firm and long-lasting global order can only be firmly established on the rule of law. Whereas the rule of law is the foundation of this construction, other rules of international law are also blocks to be put one on another in order to keep them together.

In this universal picture, states are not only residents but also main joint engineers of this shared structure. Problems are universal and exceed one single state means and capabilities. As it is in the whole international community's interest, solidarity is indispenseble. As a reflection of international cooperation, international organisations can be portayed as specialized engineers instituted by states to tackle the problems to this end. They additionaly provide for an area which can be depicted as building offices where states and related actors come together, produce plans and choose materials collectively for the construction of their common destiny written in international rules.

In this context, alongside the codification of international law, through its inspirational and guiding work that can forminternational rules, the ILC is regarded as one of the main architects of this construction.

In this setting, I think the continuation of ever-improving functioning of the ILC for the last 70 years does also mark the success of the joint efforts of the international community in adherence to the rule of law. With this understanding I congratulate on the seventieth anniversary of the Commission, former and present members, also Member States for their contributions to the architecting of the works carried out by the ILC during those 70 years.

Thank you.