Comments of the Islamic Republic of Iran

on

"Draft articles on Prevention and Punishment of Crimes Against Humanity"

1. The Islamic Republic of Iran is of the view that the idea of drafting a new convention on crimes against humanity by the ILC, is premature and due to many reasons, still needs serious consideration: Firstly, crimes against humanity as a crime under international law has been defined clearly in numerous international instruments since the Second World War, the most important of which being the Rome Statute of the International Criminal Court (Rome Statute); Secondly, several States have criminalized crimes against humanity in their national legislations, which provides a solid base in prosecution of perpetrators of the crimes against humanity; and thirdly, under the principle of *Aut dedere aut judicare* (which has been included in several international instruments), bilateral judicial assistance agreements and other international instruments, there exists sufficient legal basis as to the prevention and punishment of crimes against humanity.
2. In this regard, it should be noted that the solution to addressing the existing insufficiencies in the implementation of some provisions on crimes against humanity 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; 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.
3. Above all, the divergent views expressed by Member States during previous years in the Sixth Committee sessions calls into question the feasibility of the decision of the ILC to draft a convention on crimes against humanity. Accordingly, the Islamic Republic of Iran

recommends the ILC to opt for “draft guidelines” as a proper form for the final outcome of the work.

4. As will be stated hereunder, some of the draft Articles add to the complexity of the issue and are prone to ignite further debate especially taking into account the diverse interpretations given so far by international tribunals on the notion of crimes against humanity, the non-universal nature of the definition codified in the Rome Statute and diverse definitions and interpretations adopted by Member States as drafted in draft Article 5.
5. The Islamic Republic of Iran believes that the work of the ILC on this topic should be fully in conformity with and not deviate from the Rome Statute, to the exact extent that it deals with the crimes against humanity. Thus, reproducing Article 7 of the Rome Statute in draft Article 2, 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 International Criminal Court. 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.
6. Nonetheless, 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. According to this proposed paragraph, “this draft Article is without prejudice to any broader definition provided for in any international instrument or national law”. The Islamic Republic of Iran has 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. Furthermore, the new suggestion in making reference to the “customary international law” is a very new one that will challenge the non-hierarchical order between the main sources of international law and, in practice, put into question the defined scope of the proposed text. This is also the case with regard to “the international instrument” in paragraph 3 of draft Article 2, especially in the light of the explanation made in the commentary that it is to be understood that is beyond legally binding international agreements and can encompass

other instruments such as resolutions of the international organizations.

7. It is worth mentioning that the codification should be based on a thorough review of State practice. In the draft Articles, significant attention has been given to the practice of international judicial organs, whereas, by contrast, little reference has been 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.
8. 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.
9. The formulation of draft Article 3, 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" as well as "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".
10. With regard to the third paragraph of proposed preamble, the Islamic Republic of Iran maintains that there is no consensus on the topic of "peremptory norms of general international law *(Jus cogens)*" in international law, and the practice as well as *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.
11. 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. It will ultimately add

on to the legal ambiguity on the scope of prevention. Hence, it is recommended that draft Articles articulate the obligations of States in detail and do not leave it to subsequent practice of Member States. More importantly, subparagraph b of paragraph 1 of the draft Article 4 provides that States are under an obligation to cooperate, as appropriate, with "other organizations"; and in accordance with 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 ILC should therefore reconsider this issue with much caution, since it seems inappropriate to impose such an obligation upon States.

12. With regard to inclusion of the term "membership of a particular social group" in paragraph 11 of draft Article 13 on the substantial grounds for refusal to extradite, the Islamic Republic of Iran is of the conviction that the term would be subject to a wide range of divergent interpretations that will impede cooperation for extradition. Thus, the ILC had better deleted it from the draft Article to make it clearer and more robust. By the same token, 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, the Islamic Republic of Iran is 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 Rome Statute.
13. As regards the paragraph 9 of draft Article 14, the rationale behind the idea of devising a monitoring mechanism or arrangements is missing, since it is dealt with a legal concept, i.e. crimes against humanity, and the most similar Conventions dealing with genocide and war crimes do not have such mechanisms either. The Islamic Republic of Iran strongly believes 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.
14. With respect to paragraph 8 of draft Article 6 concerning the liability of

legal persons, the Islamic Republic of Iran is 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 Rome Statute. Moreover, there exist 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. Moreover, the inclusion of liability of legal persons may create practical difficulties and uncertainty with respect of the implementation of other provisions of draft Articles including draft Article 14 on "Mutual Legal Assistance". Therefore, it is advisable to leave this issue to the national law and decision of States.

15. It appears that paragraph 2 of draft Article 5 puts forward a non-legal criterion for determination of the refusal for the extradition of a criminal to a requesting state, which may be abused due to politically motivated considerations. The current formulation of this draft Article would lead to impunity or arbitrary implementation of justice. There exist other instances where the draft Articles have, willingly or unwillingly, linked the future convention with political issues. For instance, paragraph 9 of draft Article 14 is intended to create an obligation for Member States to enter into agreements or arrangements with international mechanisms that are established by the United Nations or by other international organizations with a mandate to collect evidences, with respect to crimes against humanity. Formulating a linkage between the possible convention on crimes against humanity with such mechanisms that may be established through the politicized decisions of the United Nations or other international organizations would increase the politicization of the overall process and does not seem necessary.
16. The Islamic Republic of Iran takes note of the several requests made by the Member States to conduct further holistic and substantive consideration for the draft Articles and ensure its consistency with their national laws. While the Sixth Committee is considered the appropriate forum, therefore, the Islamic Republic of Iran encourages the Committee to continue its deliberations on this agenda item, including moving forward with a holistic approach regarding all existing products of the ILC that are pending before the Sixth Committee. In addition, the Islamic

Republic of Iran expresses its dissatisfaction regarding the selectivity of the ILC's products wherein a number of them are pending in this Committee years before the submission of the draft Articles on Crimes against Humanity.

17. The Islamic Republic of Iran reiterates that all Member States are committed to the noble objective of preventing and punishing crimes against humanity, fighting impunity and ensuring accountability for serious crimes. The draft Articles would be effective if guided purely by human rights and human dignity and provide assurances to prevent and punish crimes against humanity free from political considerations and selective approaches detrimental to the whole process. Therefore, the Islamic Republic of Iran is of the view that such an important instrument should be the product of an inclusive intergovernmental and Member States driven process and the work of the ILC could be considered as a valuable source in a well-defined process that could be shaped under the auspices of the Sixth Committee.
18. In conclusion, for the abovementioned reasons, the Islamic Republic of Iran is not yet convinced that drafting a new convention could bring any added value to the existing international legal framework in this regard. Therefore, the draft Articles on the "Prevention and punishment of Crimes against Humanity" should be remain open to further in-depth discussion and consideration of Member States in the Sixth Committee. It is important to focus on legal issues, avoid politicization and selectivity and create a framework that genuinely addresses the plight of mankind, whenever they face crimes against humanity, in full conformity with the principles and objectives of the United Nations Charter.