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STATEMENT

By the Representative of the Russian Federation in the Sixth Committee of the 68th session of the UN General Assembly on Agenda item: Report of the International Law commission on the work of its 65th session (Topics: "Protection of persons in the event of disasters"; "Provisional application of treaties"; "Formation and evidence of customary international law"; "The obligation to extradite or prosecute (*aut dedere aut judicare)"; "Protection of the environment in relation to armed conflicts")

Mr. Chair,

We would like to begin this statement by the topic of "**Protection of persons from disasters"**. First of all let extend our gratitude to the Secial Rapporteur, Mr. Valencia Ospina for his tireless efforts in advancing this complex and controversial topic.

The further the Commission advances in its work on this topic, the more doubts we have whether draft articles that are usually prepared for adopting a legally binding document on their basis should become the result of the work of the Commission. Perhaps a more appropriate approach in the context of this topic would be the drafting of guidelines that would regulate the cooperation of states for prevention and mitigation of consequences of disasters. It seems that this format of work could allow the Commission to elaborate a truly relevant document that would be of assistance in an uneasy task of countering the calamities. We consider it important that the rules developed by the Commission were targeted precisely on cooperation among states in assisting the affected states and their population respectively instead of formulating strict legal obligations, which may even more overburden a State experiencing a difficult situation as a result of calamity that befell it.

We believe that this general argument is applicable to all draft Articles adopted during the last session of the Commission.

Thus, Article 5 *bis* on forms of cooperation deals rather with the forms of assistance that the international community can provide to the affected State. We believe that

this list is of illustrative nature and should not be exclusive. This Article can hardly be regarded as one creating legal obligations. It is more of a descriptive nature.

We believe it would be important to note in this Article that the forms of assistance offered to the affected State should be based on its request. Who if not the affected State knows better what forms of assistance it requires?

As to Article 5 *ter* on cooperation for disaster risk reduction it should in our view become a part of Article 5 on duty to cooperate. In this connection we would like to make a general comment regarding an obligation to cooperate formulated in Articles 5 and 5 *ter*. There is a general obligation of States "in accordance with the present draft articles" to cooperate among themselves, and with the United Nations and other competent international organizations, including NGOs. We do not see grounds to state that such an obligation has been established in the contemporary international law. In our view the affected State has the right to choose from whom it will receive assistance from and with whom it will cooperate in reducing the risk of disasters and their consequences. This follows from the principle of sovereign equality of states.

It seems that if in this context there is any need to develop a rule as progressive development of international law it should pertain to an obligation of States to cooperate, within their capacities, among themselves and with international organizations in order to provide assistance to the affected State and assist each other in disaster risk reduction.

It is not quite clear what is the purpose of Article 12 that asserts the right of States, international organizations and NGOs to offer assistance. We believe that this Article is stating the obvious.

Draft Article 13 relating to the conditions on the provision of assistance imposes certain limitations on an affected State when formulating such conditions. It seems that the same limitations on formulating conditions should be imposed on the States that provide assistance.

We would like raise objections with paragraph 8 of the commentary to this Article where it refers to the need to launch a procedure of objective assessment of assistance required, it may imply the presumption of distrust to the request of the affected State being built into the draft articles.

On the whole this Article in our view follows a not quite clear logic of articles, according to which the entire process of provision of assistance is launched not by the request of the affected State but by the right of other actors to offer such assistance.

Article 14 on the whole does not raise objections. We would like to propose however to make the taking of domestic measures to facilitate assistance such as privileges and immunities or tax exemption conditional on the phrase "where applicable". These privileges would not necessarily be appropriate in all cases.

In Article 15 on termination of external assistance we propose to include a key phrase contained in paragraph 2 of the Commentary to that Article:

"When an affected State accepts an offer of assistance, it retains control over the duration for which that assistance will be provided".

Article 16 on the duty to reduce the risk of disasters is another example of progressive development of Law. We believe that the parallels with international human rights law drawn in paragraph 4 or of the Commentary or analogies with with international environmental law are not quite appropriate in this context. It seems that in practical terms each State is willing to reduce the risk of disasters but not every state has the capacity to take such measures. Therefore, we believe that this rule should also be formulated in the form of a recommendation and include a qualifier phrase "within their capacity".

In conclusion we would like to once again recommend to the Commission to reexamine the form of the final product that will be submitted to states on this topic.

Let me turn now to the topic of **Provisional application of treaties.** This topic seems to be as never relevant. We believe that during its examination the Commission should in all cases follow a cautious, balanced and pragmatic approach and proceed from the understanding that Article 25 of the 1969 Vienna Convention on the Law of treaties is the departing point in any analysis of the concept of provisional application of international treaties.

While considering this topic it is important to distinguish between "provisional"/"transitional"/"intermediate" treaties and the treaties that are provisionally applied. The former, as it seems, could be taken into consideration within this topic only if they are provisionally applied.

We believe that the Commission should not get much in depth on theoretic research of the issue of correlation between provisional application of international treaties and the provisions of constitutions or other domestic acts of States whether it violates the principle of separation of power or prevents the parliamentary control over executive authority. This question might be considered only to the extent that it concerns possible invocation of violation of internal procedures as a ground for non-

compliance with a provisionally applied treaty. Of interest is the practice of States that has “an external effect”.

We support the plans of the Commission to study the interrelation of Article 25 of the Vienna Convention with its other Articles and determine the effects of violation of a provisionally applied treaty. From a practical point of view the issue of the regime of provisional application as a norm of international customary law also deserves undoubtedly our attention.

We believe that the work of the Commission should be based on a comprehensive study of the practice by the states, in particular it is worthwhile to examine practice of provisional application of treaties, which do not provide for provisional application in their text.

To sum up all of the above we see the task of the Commission as follows: to systematize the issue of provisional application of international treaties along the lines indicated in the Report neither encouraging nor discouraging recourse to provisional application of international treaties. This institution is not worth being excessively regulated. We would like to support in this connection the proposal of the Special Rapporteur to prepare draft conclusions on this topic and model clauses on provisional application of treaties.

Turning to the topic **“Identification of customary international law”** we would like express our gratitude to the Special Rapportuer, Mr.Michael Wood, for the preparation of a very useful Report on this topic for the last session of the Commission.

First of all we would like to note that we do not object to the renaming of the topic. However, we consider that the change of the name of the topic should not mean that the Commission will give up the research of the issue of the process of formation of a norm of international customary law. This issue, in our view, is one of the central issues for this topic.

We welcome the intention of the Special Rapportuer to consider the practice of states from all regions of the world while considering this topic. We generally support this approach in the work of the Commission, however, it is even more important for the elaboration of a general approach on how to identify customary international law.

We concur with the intention of the Commission to offer tates draft conclusion with commentary as the end-result of its work. We expect that upon the results of the work of the Commission on the topic of international custom a Guide will be drafted that

will have not only theoretical but as well practical value primarily for those who apply the norms of international law, while not being experts in the area of international public law.

We also support the Special Rapporteur in the idea not to deal with the issue of *jus cogens* rules as part of the topic under consideration.

During examination of this topic at the last session of the Commission a question was raised whether the process of formation of the rules of international customary law was different in various areas of international law, such as human rights, international criminal law and international humanitarian law.

This issue requires a careful study. We believe however that it is important to proceed from the understanding that international law (including international customary law) is a unique common system of law and the process of its formation should not be split into separate areas.

Naturally, for efficient work of the Commission on this topic it is necessary to study the correlation of an international custom and an international treaty and general principles of law.

We also call on the Commission to carefully study the issue of potential transition of treaty rules into the rules of international customary law recognized by Article 38 of the Vienna Convention on the law of treaties.

We also believe that the inclusion in the future Guide of a glossary of terms and their definitions will be of practical utility primarily for practitioners who are not experts in the area of international public law.

The research on the practice of States should be careful not to place too much emphasis on the practice of national courts, which by passing their decision relating to international relations apply the already existing law. Accordingly, the practice of national courts can be discussed only in the context of confirming the existence of a rule of international customary law binding upon that State. In our opinion it is incorrect to refer to the national courts decisions as a practice of States that can lead to the emergence of a rule of international customary law.

We also call on the Commission to study whether the practice of States creating an international custom includes not only the real acts by the States but also other acts by the States, in particular, their official statements at the international organizations and international conferences. As it seems, we cannot either ignore the fact that the

practice of states may consist not only of positive acts but also of refraining from acts by the way of "non-declaration" of protests against an active practice of other states.

In our view the content of the rules of customary international law will be hard to establish without taking into account various resolutions adopted by States within the international organizations, in particular consensus resolutions adopted by the General the United Nations and reaffirmed by the decisions of the Organization over the years.

Topic: **The obligation to extradite or prosecute (*aut dedere out judicare*)**

The Russian Federation is carefully watching the work of the International Law Commission on this topic. During the last session the open-ended Working Group of the Commission prepared the Report summarizing the previous work on this topic, the existing types of treaty provisions, containing the *aut dedere aut judicare* principle, as well as the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium vs.Senegal)* case.

We note that over a number of years the Commission was not able to move forward on this topic. In this regard we were wondering whether the work of the Commission on this topic should be continued.

In conclusion I would like to make some general comments on the topic: "**Protection of the environment in relation to armed conflicts".** We are of the opinion that this topic is sufficiently regulated by the International Humanitarian Law. The idea that the scope of this topic should cover the period before and after conflict raises serious doubts as the time before and after the conflict is considered to be a peace time during which the general rules applicable to the protection of environment should be fully in effect. We do not think that the elaboration of comprehensive regulations in this area is the goal of the Special Rapporteur.

Thank you, Mr. Chairman.