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STATEMENT
by the representative of the Russian Federation
in the Sixth committee of the 71st UN GA session on agenda item "Report of the International Law Commission on the work of its 68th session"
(Topic: "Protection of persons in the event of disasters", "Identification of customary international law", "Subsequent agreements and subsequent practice in relation to the interpretation of treaties")

Mr. Chairman,

Allow me to thank the Chairman of the International Law Commission for presenting the report of the Commission. This year the Commission worked quite productively: it completed the first reading of the two drafts on the "**Identification of customary international law"** and "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**", and the second reading of draft articles on the **"Protection of persons in the event of disasters"**.

We should like to start our comments by this last draft and express our deep appreciation to the Special Rapporteur, Mr. Eduardo Valencia Ospina. During its work on this document in the second reading the Commission did not abandon the

initial idea to elaborate precisely the draft articles. The Russian delegation continues to believe that a draft guidelines would be the best form for this document.

This flexible form – a draft guidelines – would make it possible to incorporate in the most effective way the results of the Commission's work in the daily activity of states, which participate in the protection of persons in the event of disasters.

Quite a number of comments made by the Russian Federation on draft articles adopted in the first reading have not been taken into account in the new version. These comments remain relevant with respect to the outcomes of the second reading.

We took note again of article 7 "Duty to cooperate" and article 8 "Forms of cooperation in the response to disasters". As compared to the first reading the Commission added during the second reading a time qualifier in the response to disasters, thus leaving outside the brackets the so-called pre-disaster stage. We support such an approach. However, with regard to article 7 we continue to believe that it is necessary to separate the cooperation between states which is the implementation of one of the fundamental principles of the international law and duty to cooperate with international governmental and non-governmental organizations and with "other assisting actors". A question arises: to what extent it can be asserted that the above-mentioned organizations and actors have the same responsibility?

It is our understanding that article 9, which is an example of progressive development of international law, contains an obligation with respect to the conduct instead of result.

We are slightly confused in article 10 about the qualification of the role of the affected state as "primary" one. Does it mean that the responsibility for the direction, control, coordination and supervision of the relief assistance can be shared with some other entity which plays the secondary role?

Article 11 is related to article 13, paragraph 2, which states that the consent of the affected state to assistance shall not be withheld arbitrarily. How can we

determine the degree of this arbitrarily decision? We are entering a very shaking ground in this sensitive qualifications.

The draft articles in principle have been composed with a shift to obligations of the affected state. Few provisions are related to the rights of the affected state, and even less provisions to the obligations of the states and other actors that provide assistance. It seems to us that we have here a certain imbalance.

The Commission tried to correct this situation by adding in article 13 the obligation of the entity that received the assistance request to promptly examine this request and inform the affected state. In our view the Commission can move even further and mention in particular that the personnel dispatched by the state that provides assistance or other actor must respect the national legislation of the affected state and not interfere into its domestic affairs when deployed on its territory. The absence of such a provision is strange taking into account the extent of obligations to facilitate external assistance imposed on the affected state by article 15 and article 16 (protection of relief personnel, equipment and goods).

In conclusion, we would like to note that we continue to examine the draft articles. We do not exclude that they might be of help in addressing the issues of emergency response.

Turning now to the topic of "**Identification of customary international law**" let me first of all to congratulate the International Law Commission with the adoption in the first reading the draft conclusions and thank its Special Rapporteur, Sir Michael Wood for his outstanding contribution to achieving this significant result.

The depth and extent of the subject of this topic raised discussions on whether the Commission would be able to prepare a draft which could be in fact practically useful rather than become one more essay on the theory of law. The Commission has managed to deal with this complex task within an impressive short period of time. There are all grounds to believe that the result of this work will become a useful methodological handbook for identifying the norms of customary international law.

During its work on this topic the Commission maintained a pragmatic approach and therefore left aside a number of issues or just touched them briefly. Using this approach the Commission abandoned fruitless theoretical discussions and opted for a practice oriented handbook. However, some problems have not been studied by the Commission. The draft contains a reference to such issues in paragraphs 4 and 5 of the comments to draft conclusion 1.

In our view we still need to examine some aspects that are important for identification of the norms of customary international law. This concerns for example a situation when there is a treaty norm in the area where new practice emerges, which can testify that a new norm of customary law comes to existence. In other words can the conduct of a state which contradicts the norm of an international treaty make contribution to the establishment of a norm of customary international law? It seems that in such case there should be at least a presumption that a norm of customary law does not exist.

We would like to propose to the Commission during the second reading of a draft either to carefully study this issue by adding a separate provision in this regard to the draft or to add an additional conclusion stating that this draft is without prejudice to the issue of correlation of sources of international law including *jus cogens* norms. Some contours of this new provision can already be seen in paragraph 5 of the commentary to conclusion 1.

As it seems, this issue is related to one more issue. The Commission decided not to examine in the framework of this topic the genesis of norms of customary law including their evolution. However, paragraph 5 of the commentary to the draft conclusion 2 and paragraph 3 of the same conclusion mention the existence of a common “indivisible regime” or a “fundamental principle” in certain area where the existence of the norm of customary law is discussed. It is proposed to examine all these provisions as a common context proving the existence of constituent elements of the norm of customary law mentioned in conclusion 3.

As we understand it, in this case it is a matter of the existence of preceding norm of customary law or a set of such norms. It seems that this essential issue should be examined separately rather than "be hidden" by a general phrase on the existence of a "common context" which by itself and without the commentary can mislead the user of this handbook. Today the international law has been sufficiently developed and formed a common system so that one could say that these norms do not exist in the void but instead inscribe themselves in the "common pattern".

Turning now to specific provisions of the draft we would like to begin by saying that we fully support the approach selected by the Commission in the sense that in establishing the existence of a norm of customary law it is necessary to determine separately the existence of both its elements separately – the practice of states and the adoption of this practice as a norm of law (conclusions 2 and 3 of part two "Basic approach"). As far as specific language is concerned, we would prefer the definition of practice as "settled" rather than "general" since this terminology was used precisely in the decision of the International Court of Justice on the case of "Continental shelf in the North Sea". It seems that the term "general practice" can be too light in this context.

We should like also to support the conclusion by the Commission that the rules of identification of customary international law can be equally applied to all branches of international law.

When we examine conclusion 4 " Requirement of practice", we have doubts about the use of the word "primarily" with respect to the practice of the states that contributes to the formation, or expression of rules of customary law. In our view, namely the practice of states is what creates of express rules of customary law. We are not convinced in this connection that the language of paragraph 2 of this conclusion is correct when it says that the international organizations can participate in this process.

We note that the commentary to this draft conclusion does not contain any references to the practice or other sources as an evidence of the practice of

international organizations which can form the rules of international law. Moreover, paragraph 5 and 6 of the commentary contain an idea that the international organizations basically form the practice which can be taken into account in identifying the rules applicable to themselves. It is also mentioned there that the scope of practice of different organizations varies. For example, the UN practice cannot be regarded equally with the practice of regional organizations. We believe that these commentaries should find a reflection directly in the draft conclusions.

In our view, paragraph 2 of conclusion 3 should be restricted even more by saying the practice of international organizations can contribute to the formation of customary rules applicable to these organizations and under certain circumstances embody the rules of customary law.

We agree with paragraph 3 of conclusion 4 that the conduct of other actors is not practice that contributes to the formation of rule of international law. We have, however, some questions regarding the commentary in paragraph 9. It is not quite clear why along with the NGOs and physical persons the non-state armed groups and transnational corporations are mentioned as entities that may have an important indirect role in the identification of customary law. It seems that this paragraph needs to be slightly adjusted so as to make it clear that only the reaction of states to the conduct of these entities has the importance.

With regard to conclusions 5 and 6 (“Conduct of the state as state practice” and the “Forms of practice”) we would like to take note of the following. On the one hand, the practice of various state bodies, and various branches of authority can be considered to be the practice of states for the purposes of customary law depending on certain circumstances.

We are not convinced, however, that the direct conclusion on the absence of predetermined hierarchy in such practice is justified. This being said, the commentary to draft conclusion 6 indicates that such hierarchy might exist depending on each particular case.

Let us take for example a case of practice. The courts of a state consistently deny the right to apply the immunity of a state in a certain case. But the Foreign Ministry of this state continues to insist on its existence both in courts and at the international arena. Can we say the decision of courts and the opinion of a foreign policy agency have the same force for the purposes of identification of customary international law? Is it enough in this case to make a conclusion that the heterogeneous practice weakens its value? Will such a provision be of help to the practitioners? Perhaps, it would be more useful to make a conclusion that the hierarchy does exist both in terms of the vertical of power (when the superior body has more significance that the subordinate body) and the role of a relevant body: the practice of the bodies authorized to represent states in foreign policy is more important than the practice of bodies dealing primarily with internal affairs of states.

Regarding conclusion 8 ("The practice must be general"), we would prefer the language "both extensive and virtually uniform" from the decision of the International Court of Justice on the "Continental shelf in the North Sea" instead of such qualifiers as "sufficiently widespread and representative". Moreover, we are not convinced that the draft conclusion should directly state that no particular duration is required for understanding the practice as general.

It seems that in exceptional cases the rules can take shape for a relatively short period of time. But can we make generalizations on this basis?

Conclusion 10 "Forms of evidence of acceptance as law (opinio juris)" once again raises a question whether such recognition can be recorded in the documents which mostly have domestic relevance for a state – for example, in decisions of national courts. We noted that this draft conclusion mainly prioritizes the documents related to external relations. We believe that this approach is correct.

The failure to react over time as a form of opinio juris is quite a delicate issue. We take note that the Commission has boarded this rule in a rather restrictive way. It seems, however, in this context that it is necessary to raise a question on how many

States there should be that fail to react in order to form a rule of customary law. Can we consider that when only 10 States react and all others keep silent that the rule is considered as established? It seems, however, that the number of States that fail to react should still be limited.

With regard to the draft conclusion 11 on the treaties as an evidence of existence of a norm of customary law we note that this conclusion has been drafted carefully and it mentions that the treaties can only reflect the rules of customary law which is recognized by the 1969 Vienna Convention on the Law of Treaties.

We believe, however, that it would be right to add to this conclusion the last sentence of paragraph 2 of the commentary, that the treaty by itself cannot establish a rule of customary law. It is also important to emphasize in this context the idea contained in paragraph 4 to conclusion 9 that by itself the conduct of States Parties to the treaty in accordance with a treaty is not an evidence of the existence of rule of customary law. Perhaps, it would be useful to reflect in the conclusion that first of all it deals with multilateral treaties.

We share the approaches to the resolutions of the international organizations and international conferences as an evidence of the existence of the rule of customary law contained in conclusion 12. We have some doubts with regard to the definition of "resolution adopted by an organization" as an act of this organization". The act of an organization can be a rather extensive concept and include not only the decisions of its bodies composed by States. Will it be correct in this context to give such an extensive interpretation of the concept of the "resolution by an organization"? We also believe that it would be useful to reflect in the text of this conclusion the fact that the scope of the act of the organization depends on its universality and its place in the international relations. Perhaps, it could be possible to directly mention the United Nations in the language of this conclusion.

Draft conclusion 13 on the decisions of courts and tribunals, as it seems to us, should reflect the fact that the court decisions are binding only for the parties to a

dispute as it is envisaged in article 38 of the Statute of the International Court of Justice and as mentioned in footnote 346 to the commentary, cannot be conclusive evidence for the existence of the rule of customary law. Perhaps, the conclusion should also reflect some ideas from paragraph 3 of the commentary to conclusion 13 that the scope of the court decision depends on the reaction to it by States and on the place of this court in the system of international relations. For example, the decisions of the International Court of Justice in terms of the authority can hardly be compared to the authority of decisions by the ad hoc tribunal or an arbitration court established by a bilateral treaty.

We support the provisions of part 6 on “Persistent objector State”. The only doubt we have relates to the provision stating that the objector State must persistently maintain its objection. It is necessary in this regard to take into account the reality of work of government apparatus not only in well-organized developed States but as well the reality of States with small foreign policy agencies that do not have sufficient resources to continuously respond even in the situation when their interests have been directly affected.

We share the provisions of the Part dealing with particular customary international law. We noted that the Commission abstained from drafting any specific rules applicable to constituent elements of such customary rule. Perhaps, we need to examine this issue one more time. This has to do for example with the issue whether a particular custom can be established if there is an objector State?

We continue to examine the draft conclusions on “**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**”. We express our appreciation to the Special Rapporteur, Mr. Georg Nolte and intend to present our written comments on this topic.

Thank you, Mr. Chairman.