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# STATEMENT
## by the Representative of the Russian Federation, in the Sixth Committee of the 72nd session of the UN General Assembly on agenda item: "Report of the International Law Commission on the work of its 69th session"

Mr. Chairman,

Allow me to thank the Chairman of the International Law Commission professor Georg Nolte for presenting the report on the work of the Commission at its 69th session. We also welcome in this room the Special Rapporteurs of the Commission.

The Russian delegation is following with great attention and interest the work of the Commission. It is hard to overestimate the contribution that the Commission has made by its many years efforts to codification and progressive development of international law.

The high authority of the Commission entails its particular responsibility in selecting the topics for consideration, their research methodology and the conclusions it presents for consideration by state. International law is a "living organism" which develops along with changes in the international relations. We should not forget however that international law also plays the role of a foundation

to international life which should be solid and stable in order to ensure the sustainability of the entire system.

There are various opinions in the academic community regarding the future directions in the development of international law and various NGOs call on the states to take upon themselves "higher commitments". We should not however ignore the fact that the states are the main subjects of development of international law and the Commission should take into account precisely the opinion of states, their practice and policy.

We believe that the Commission should demonstrate "reasonable conservatism" in its work.

Mr. Chairman, due to organizational reasons we would like to cover in one statement all clusters in the Commission's work as well as future topics.

This year the Commission adopted in the first reading the draft articles on the **"Crimes against humanity"**. The Russian delegation is carefully reviewing this draft and intends to present its comments within the established timeframe.

We would like also to touch upon to other topics on the Commission's agenda: **"Protection of the atmosphere"** and **"Protection of the environment in relation to armed conflicts"**. These two issues have been long considered by the Commission which is working on their-related guidelines. However, the review of these principles leads us to believe that for the time being there has been no sufficient practice of states in the two designated areas that would prove the need for additional regulation. There are international instruments both in the first and the second topics, which in our view sufficiently regulate relevant relations among states. The addition of principles of general character on the need for cooperation, exchange of information and conclusion of additional agreement would hardly enhance the legal certainty.

Therefore, we would like to express doubts regarding the prospects of future work on the abovementioned topics.

The topic: **"Immunity of State officials from foreign criminal jurisdiction"** is one of the key issues in the current agenda of the ILC. The provisions of international law regarding immunity of state officials from foreign criminal jurisdiction are extended to all officials and are a norm of common law deriving from state sovereignty as a fundamental institution of international law.

This year the Commission examined the issue of exceptions to the immunity following the proposal by the Special Rapporteur Ms. Escobar Hernández. Before giving comments on the substance of the Commission's conclusions we would like to note with regret that the exceptions became a subject for consideration by the Commission before the procedural aspects of immunity. Since immunity is of a procedural nature (and thus it is totally different from material law, which determines the legitimacy of the person's conduct), the procedural aspects of its application are of priority importance. We believe that the formulation of procedural rules of application of immunity could remove a number of provisions that are used in favor of the need to record exceptions to the immunity of the officials.

The Russian delegation shared the view of the Commission that exceptions to the immunity of the officials are not applicable to persons possessing *ratione personae* immunity. Let us emphasize once again we do believe that the persons possessing *ratione personae* immunity are not limited by the "troika" (head of state, head of government and foreign minister) but is extended to other high officials, for example the minister of defense.

Our agreement with the conclusions of the Commission ends at this point. Having reviewed the report of the Commission as well as the report of the Special Rapporteur, we would like to note that they did not provide proof, especially regarding the practice of states, of the presence of exceptions to *ratione personae* immunity in the existing international law. Equally we cannot observe the trends toward exceptions in the practice of states. Exceptions listed in draft article 7

adopted by vote in the Commission are not confirmed by consistent practice of national or international courts or national legislation.

We did not see either the agreement in the Commission on the issue whether it considered such exceptions to be *lex lata* or *lex ferenda* rule which also does not prove that this issue had been considered objectively.

Thus, we have to recognize with regret that during the consideration of this issue the objective approach was substituted by a subjective wish to create a new rule for prosecution of state officials. The questions whether international law contains exceptions to immunities and whether they should exist at all are not similar as the notions of immunity and impunity are not similar either.

It is not a question before the Commission as to how prosecute a state official but the question whether there are exceptions to the general rule of immunity of an official of one state from national (rather than international) criminal jurisdiction of another state (i.e. not the state on whose service this person works). It follows just from the name of this topic that there are other ways of prosecuting the perpetrator of a crime, for example in his own state in duly established international judicial institutions. Moreover, the state may waiver the immunity of the state official in question.

We believe that the artificial creation of an international legal norm that does not reflect the reality and confronts continuous objections of states cannot be either codification or progressive development of international law and is inconsistent with the goals of the Commission's work.

Turning now to another important topic considered by the Commission – **"Peremptory norms of general international law *(Jus cogens)*"** we would like, first of all, to thank the Special Rapporteur Mr. Dire Tladi for his report and his role in moving this topic forward.

We welcome the change of the name from "Jus cogens" to "Peremptory norms of general international law (Jus cogens)". We maintain the opinion that this

will help to determine finally the scope of the report and put an end to differences regarding the existence of regional peremptory norms.

We also share the view of the Commission that Article 53 of the Vienna Convention on the law of treaties is the basis of its work on this topic. As a whole, the definition of *jus cogens* norms as it has been formulated in draft conclusion 3 (annexed to the report of the Chairman of the ILC Drafting Committee) goes in the right direction.

As a positive point we note the exclusion from definition of the elements foreign to the Vienna Convention (fundamental values protected by the norm of *jus cogens*, the high hierarchic prevalence and universal applicability) which were moved to draft conclusion 2. We question this draft conclusion. We think that in general it has no regulatory content and can be moved to the preamble or the comments to the draft. Moreover, we would like to draw the attention to the fact that this draft conclusion has substituted the central concept of "international community of states as a whole" for the norms of *jus cogens* by the concept of "international community", which introduces legal uncertainty.

Turning back to the definition, we note that the definition itself and subsequent conclusions divide the criteria of *jus cogens* norms into two elements: (1) the norm of general international law and (2) accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified by the subsequent norm of international law of the same character.

We think that this important characteristic of *jus cogens* norms, precisely their invalidation effect is not only the consequence but the criterion on the *jus cogens* norms and we would propose to add this characteristic in the definition.

We would like also to raise another key point for this topic. Draft conclusion 5 has chosen the interpretation under which the customary law is the main source of

peremptory norms while the treaty norms and general principles of law can serve only as a basis for such norms.

We do not share this approach. It is our understanding that the fundamental peremptory norms of international law have been created by a universal treaty – the UN Charter. It was precisely this treaty established the principle of non-use of force that had not existed before. We propose to the Commission to adjust the draft accordingly.

We agree with the conclusion of the Commission that the recognition of the norms as a *jus cogens* norm should be different from its recognition as a norm of general international law and should be identified separately (draft conclusion 6).

Nevertheless, we have questions regarding draft conclusion 7. Paragraph 1 of the conclusion rightly points out that the recognition of the *jus cogens* norm is exercised by "the international community of states as a whole" which, in our view, means the consensus among all states. However, the second paragraph actually implies that the recognition by the prevailing majority of states instead of all states is required.

We believe that the recognition by all states is required but such recognition will not be active in all cases. The *jus cogens* norm may arise with active recognition by significant majority of states and non-objection by others.

As to further work of the Commission it is important to consider the proof of recognition of the norm as *jus cogens*. Here in our view it is important to recognize the practice of states rather then other actors.

During the discussion of the report in the Commission a question was raised once again on the need to compile the list of *jus cogens* norms. We continue to support the Special Rapporteur that this decision should be treated with utmost caution and at this stage first of all he must focus on identifying general requirements to the definition of the *jus cogens* norm.

The Russian delegation has reviewed the work of the Commission on the topic "**Succession of States in respect of State responsibility**" led by professor Pavel Šturma.

At this stage it is not quite clear to us whether the work on this topic may be productive.

On the one hand the first report on this topic states that it is necessary to clarify the question whether there are the norms of international law that regulate the transfer of rights and obligations arising from international responsibility of states for an internationally wrongful act. On the other hand it is noted that it is necessary to examine the practice of states and other relevant evidence necessary for identification of the norms of international law and decide whether such norms actually exist.

In light of the above as we understand the Commission was unable to conclude whether there is a general norm of succession of states in respect of responsibility or the general norm is the norm of non-succession.

As we understand the Commission tends to recognize the existence of the norm of non-succession and potential exceptions to it.

Codification of international law is possible only when the norms do already exist. We believe that there is no norm of customary law that would codify the possibility of automatic transfer to the successor state of obligations arising from an internationally wrongful act.

Moreover the Special Rapporteur provides the examples of court decisions which in his opinion serve as an evidence of the emerging trend to revise the general norm of non-succession.

However the above mentioned court decisions can not in our view serve as a proof of departure from the general norm of non-succession since these decisions do not contain a conclusion regarding the existence of the general norm of succession or non-succession. As the most important decision the Special Rapporteur

mentioned the Gabcikovo-Nagymaros case. However on this case the Court recognized for Slovakia the existence of secondary obligations before Hungary due to the existing agreement between the parties whereby they agreed that Slovakia is the only successor to Czechoslovakia. The materials of the case prove that the responsibility of Slovakia for the acts by Czechoslovakia were not based on any general norm of succession in respect of international responsibility.

As an evidence of departure from the norm of non-transfer of responsibility the Special Rapporteur has also sited the agreements on the transfer of responsibility during succession. It is not clear however whether the parties when concluding such agreements proceed from the understanding that international law does contain the norm which records the transfer of responsibility during succession or the parties rely on the rule on the freedom of a treaty. In such case these agreements can hardly be considered as to confirm the existence of the norm on the transfer of responsibility during succession.

We took note that the report of the Special Rapporteur makes a reference to the disintegration of the Soviet Union as one of the examples of the succession of the second part of the XX century when as is known the Russian Federation became a continuator of the Soviet Union. We believe that continuation does not belong to this topic.

The Russian delegation at this stage is not convinced that the work on this topic is required by the states. As is known the earlier draft conventions on succession in respect of treaties and debts prepared by the Commission did not find the required support from the states.

As to the topic "**Provisional application of treaties"** we would like to draw the attention of the Commission to the question that the Russian delegation raised earlier and which it would be useful to study in the framework of this topic. In particular it is a question on the specifics of provisional application of different types of treaties (bilateral, multilateral open, and multilateral with limited

participation); specifics of provisional applications based on unilateral declaration or a decision by international organization; and specific of termination of provisionally applied treaties. We would be interested in developing in the Commission the model provisions on provisional application of treaties.

In conclusion we would like to welcome the inclusion by the Commission of two new topics in its long term program of work: "**Evidence before international courts and tribunals"** and **"General principles of law".** We think that their consideration would be useful.

Thank you Mr. Chairman.