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STATEMENT
by the representative of the Russian Federation
in the Sixth Committee of the 73rd Session of the United Nations General Assembly on agenda item "Report of the International Law Commission"
(topics: "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", "Identification of customary international law" and "General principles of law")

24 October 2018

Mr. Chairman,

Let me thank the Chairman of the International Law Commission Mr. Eduardo Valencia-Ospina for the report of the ILC and congratulate the Commission and its members with the 70th anniversary of its essential body within the UN system.

The Commission not only made significant contribution to the development of modern international law but also changed its landscape. One cannot imagine the contemporary international relations without the documents whose drafts were prepared by the Commission – the Vienna Convention on the Law of Treaties, the Vienna Conventions on diplomatic and consular relations and the UN Convention on the Law of the Sea.

Russia is proud with its international law experts who served as the ILC members in different years. These are: Vladimir Koretsky, Fedor Kozhevnikov, Sergey Krylov, Grigory Tunkin, Nicolay Ushakov, Yury Barsegov, Vladlen Vereschetin, Igor Lukashuk, Valery Kuznetsov, Roman Kolodkin, Kirill Gevorgian. They not only made a contribution to the work of the Commission but served as a link between the Commission and the academic community of Russia. Many of them were the authors of learning courses and monographs by enriching the Soviet and Russian science of the international law.

The uniqueness of the Commission consists in the fact that it represents the manifestation of the thought of all legal systems of the world and gives an opportunities to all regions to make the contribution to the formation of the new norms of international law. Another important asset of the Commission is the lack of politicization and its desire to work on the basis of consensus. We deem it extremely important to preserve these traditions. We must avoid the voting in the Commission. We are convinced that in order to be effective the norms of international law should give the sense of involvement of all countries and regions. Therefore any haste and intent to make prevail only one point of view even if it is the point of view of the majority are inappropriate here. On the whole, we believe that it would be useful for the Commission to slow down the pace of its work. In our view, this would give an opportunity to the States to more carefully analyze the products of work of the Commission and contribute to elaboration of drafts that would be required by the States.

It is no less important in this context that the Commission hears and duly takes into account the opinions of States. We believe that the disagreement of delegations with that or another provision in the draft under consideration should be treated seriously and lead to continuation of work on the topic even if this requires the postponement of the submission of a relevant text to the Sixth Committee.

Yet another problem which I would like to touch upon now is the interaction between the Commission and the Sixth Committee. As is known, recently the drafts elaborated by the Commission have not been always the basis for further elaboration of treaties. A question why this is happening can become a topic for separate discussion. As a rule, the General Assembly takes note of a relevant draft and draws the attention of States to such a document. However, the national and international judicial authorities use those texts as a written customary law despite different opinions of the States expressed in the Sixth Committee on these drafts. It seems that this aspect needs to be additionally considered by the States. The Commission as a rule prepares the high-quality drafts. But not in all cases they reflect the customary international law. Moreover, practically every draft contains certain debatable provisions with which that or another State disagrees. In this connection it seems to be useful that the relevant decisions of the Sixth Committee that take note of the product of the Commission also attract the attention to the statements by the States and potentially publish the compilation of such statements.

Mr. Chairman,

Let me now turn to the topics of the agenda of the Commission. The anniversary year was quite productive for the ILC, which approved in the second reading two draft conclusions on the topics of "The subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Identification of customary international law".

Let me begin with **"The subsequent agreements and subsequent practice in relation to the interpretation of treaties"**. First of all, we express our deep gratitude to the Special Rapporteur Mr. Georg Nolte for comprehensive and in-depth research of this topic.

On the whole, we support the recommendation of the Commission to the General Assembly to take note of the compendium of 13 draft conclusions and draw the attention to these drafts and the comments thereto.

We support the approach of the Commission to this topic and especially the fact that its elaboration was based on the time-tested provisions of the Vienna Convention on the Law of Treaties and the rules of interpretation formulated there.

We would like to emphasize in particular the fact that the text of a relevant treaty is the basis for interpretation under the Vienna Convention in accordance with the traditional meaning of the terms used. Therefore we can argue that if the text of the treaty is sufficiently clear then other means of interpretation of the treaty may not be required or play a subsidiary role. At the same time the use of more extensive list of means of interpretation is required only if the text is unclear. Especially this has to do with additional means of interpretation contained in Article 32 of the Vienna Convention whose use is optional.

As to draft conclusion 11 on the role of decisions taken in the framework of the international conferences of the member States, it seems that the legal effect of such decisions depends not only from the treaty and the rules of procedures (albeit this is important since there is a practice, when such decisions are taken in violation of the mandate or the rules of procedure). The legal effect depends on whether the decision was taken by consensus or insignificant majority of States although it was envisaged in the rules of procedure. In this context, the conduct of States in connection with the adoption of the decision (explanation of vote, etc.) is also important.

Draft conclusion 12 says that subsequent agreement and subsequent practice may arise from the practice of the international organization in applying its statutory document. We believe that we should distinguish here between different types of the practice of organizations. For example, the practice of a body representing all members of this organization especially elaborated by consensus can be a practice or an agreement for the purposes of interpretation of a statutory document of this organization since in essence it is the practice of States who created this organization. As to the practice of the bodies of limited composition or the officials of this organization, in this case not the practice itself is important but rather the reaction of member States to this practice.

The Russian delegation has some doubts regarding paragraph 3 of draft conclusion 13 under which the treaty bodies can refer to subsequent agreement or practice. In this context the reaction of States to a relevant decision or recommendation is also a major element.

Now let me say a few words regarding draft conclusions on the topic of **"Identification of customary international law"**. First of all, let me express our thanks to Sir Michael Wood for the elaboration and successful completion of the work on this topic.

The draft conclusions on this topic are quite relevant since they are designed to counter the trend that emerged in the work of international and national courts when they so easily determine the presence of a customary norm of law on the basis of the opinion of that or another international body or the practice of limited group of States. We are convinced therefore that the current draft will bring great practical benefits.

On the whole, we support the recommendation of the Commission to take note of draft conclusions and draw the attention of States to them. We are not against either the call to the States to publish their practice. We believe at the same time that we need to analyze the appropriateness of the reference to the publications of the UN Secretariat as an evidence of customary international law or creation of a relevant data base of such evidences. It seems that a situation may arise when the international and national courts begin to extract customary norms from such publications and data bases without additional analysis. We need to avoid such a situation. In our view, every court must independently assess the existence of relevant practice and *opinio juris* in certain area rather than draw information from a single source.

Moreover, it seems it could be useful to draw the attention to the comments of States expressed on the draft conclusions in a relevant General Assembly resolution. On our part we would like to note the following.

The draft states that it does not cover the relationship between different sources of law such a customary law and treaties or *jus cogens* norms. Such an approach seems to be only partially justified. The modern international law is quite a ramified system. Albeit it is less definite than the systems of domestic law one can hardly find at present the area of international relations that would not be affected by that or another treaty or the *jus cogens* norm.

Based on this we have repeatedly mentioned earlier that it would be important to record in the draft that the practice or *opinio juris* cannot turn into a norm of customary international law if it is inconsistent with the existing *jus cogens* norm or a norm of treaty. Without the application of such a rule the establishment of the existence of the norm of customary law would be quite a risky endeavor. A similar rule is reflected in the Vienna Convention on the Law of Treaties where it states the invalidity of a treaty which is inconsistent with the *jus cogens* norm.

On the whole, we support the overall approach recorded in the draft and based on Article 38 of the Statute of the International Court of Justice stating that for the establishment of the norm of customary international law the common practice of States and *opinio juris* and these two elements must be established separately.

As to draft conclusion 4 "Requirement of practice", we believe that only the practice of States can make a contribution to the formation of the customary law. The practice of international organizations by itself cannot have a similar effect and rather has the meaning of a reaction to such practice from the States.

Paragraph 2 of conclusion 8 which clearly records the absence of the need for the duration of practice, in our view, is not useful. It would be more correct to indicate that for establishing a customary the practice should be settled.

We have some questions regarding paragraph 3 of draft conclusion 10 which states that the absence of a reaction to practice can be an evidence of the recognition of a legal norm *(opinio juris).* As is known, the States may abstain from stating their position on that or another issue due to political consideration and this should not be considered as a form of *opinio juris.*

As to the importance of the treaties for identification of customary law (conclusion 11), we should not create the impression that each multilateral treaty with rather wide participation creates a customary norm. As is known, the behavior of State regarding the compliance with the treaty should not by itself be considered as the expression of the practice of a State or *opinio juris* for the purposes of establishing the norm of customary law.

We do not fully share the approach expressed in draft conclusion 12 "Resolutions of international organizations and intergovernmental conferences". A resolution can serve as an evidence for establishing the existence or content of customary norm along with the behavior of States during its adoption (whether it was adopted by consensus or vote and what statements were made as an explanation of vote).

The provision on the persistent objector contained in draft conclusion 15 is an important rule. It is our understanding that if any State declared that its corresponding behavior and *opinio juris* are not a customary norm then such a norm even if it arises in the relations with other States will not be considered as obligatory for this State.

In this context, unfortunately, we did not examine the question of what happens in a situation when there are many objector States. Does it mean that the norm of international customary law was not formed?

Mr. Chairman,

In the section on other decisions of the Commission we would like to share our ideas on the topic included in the program of work of the ILC – i.e. **"General principles of law"**.

We believe that the topic of the general principles of law undoubtedly represents some interest from the viewpoint of the doctrine and practice. Nevertheless, we believe that in light of the specifics of this topic we need to additionally think about the form of the future work. We believe that the most convenient form of the final product of the Commission is the analytical report.

We carefully studied the preliminary report of Mr. Marcelo Vázquez-Bermúdez on this topic. Undoubtedly, the concept of the general principles of law requires further in-depth elaboration. However, we believe it is possible to present certain comments on the substance of the issue under consideration, its scope and methods of the research at the current stage.

The issue of the general principles of law was and still remains the subject of animated doctrinal discussion mainly in connection with subparagraph (c) of paragraph 1 of Article 38 of the Statute of the Permanent Court of International Justice and currently the International Court of Justice. It should be mentioned in this connection that for interpretation of the relevant provision of the Statute of the International Court of Justice the understanding that was recorded in this paragraph by the drafters of the Statute of the Permanent Court of International Justice is mainly of historic value. The Statute of the International Court of Justice is an international legal act different from the Statute of the Permanent Court of International Justice and it was elaborated in totally different historic realities. It is our understanding that the research of the topic of general principles of law in light of the practice of the Permanent Court of International Justice is not always justified.

It seems that the provision stating that the Court must examine the litigation assigned to it on the basis of international law is substantial for the understanding of subparagraph (c) of paragraph 1 of Article 38 of the Statute of the International Court of Justice. If follow from this provision that the general principles of law applied by the Court are the norms of international law. As was rightly stated in this connection by the recognized Soviet international layer and the judge of the International Court of Justice Vladimir Koretskiy "the Court must apply the principles of international law rather than the principles of domestic law of States". It seems that the elaboration of the topic of general principles of law is a subject to research in the international legal context.

In this connection we would like to draw your attention to the approach proposed by the Special rapporteur to the research of the topic of general principles of law, which uses as the basis among other elements the analysis of national judicial practice of States. Naturally, the normative principles of the national legal systems influence the development of the international law. Moreover, they can serve as the material for developing relevant norms of international law. However, the norms of domestic national law can be changed at the discretion of a State. Moreover, these norms are obligatory only within the system of national law. We cannot disagree with the renowned Soviet researcher and the member ILC Grigoriy Tunkin, who stated that the existence of similar principles in the national legal systems of even all States does not imply at all their legal force in the system of the international law. He expressed a right opinion that any norm of law must be recorded by the treaty or custom in order to be applied in the international law.

It is our understanding that the provisions of subparagraph (c) of paragraph 1 of Article 38 of the Statute of International Court of Justice have their own specifics and a character different from other international legal norms, but not a specific form of developing international legal norms.

We would like to draw your attention to the fact that this provision deals with such general principles of law that have been recognized by the civilized nations. This means that the use of general principles of law (as any other international legal norm) in the system of international law is due to the recognition by States as the norms existing in the system of international law which as it was already mentioned is established by treaty or custom. Therefore, the Court can only identify and apply only the norm, including the general principle of law, which exists in the system of international law, i.e. derives from international treaty or customary international law.

In the context of recognition of the norm as a general principle of law it is essential to examine the law enforcement practice. We would like to draw your attention to the references contained in the submitted report to the practice of international criminal justice institutions. We believe it is incorrect to use as the source for developing the general principles of law the corresponding methods of work of international criminal courts and tribunals, such as ICTY or ICC.

We believe that the general principles of law are the basic and general provisions of international law (such as the principle of faithfulness and the principle lex specialis derogate legi generali etc.). Meanwhile we would not equate the general principles of law with general principles of international law. It is not a coincidence that the Statute of the International Court of Justice contains in its Article 38 the language "common principles of law" instead of "general principles of international law". The opinion of professor Charles Rousseau expressed in this regard is right when we deal with the principles of law in general that are common not only for national legal systems but also an international law as the special system of law.

We are looking forward to further in-depth comprehensive elaboration of this topic within the ILC.

Mr. Chairman,

In conclusion I would like to say a few words in connection with the decision to include in the long-term program of work of the commission the topic "**Universal jurisdiction**". We believe that currently the agenda of the Commission is filled out. We do not deem it appropriate to incorporate this topic in the current program of work in the near time. This topic has been considered for several years in the Sixth Committee and the debates do not give grounds to believe that there are the norms of customary law in this area that could become the subject to codification.