I h k l h y g g h _
i j _ ^ k l Z \ b l _ e v k l
J h k k b c k d h c N _ ^
i j b H j] Z g b a Z p ł
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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 LQ WKH PRVW HIIHFWLYH ZD\ WKH UHVXOWV RI WKH ZRUN RI WKH 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 DUWLFOH ³'XW\ WR FRRSHUDWH FRRSHUDWLRQ LQ WKH UHVSRQVH WR GLVDVWHU Commission added during the second reading a time qualifier for 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 ³other 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 DIIHFWHG VWDWH. Does it mean that the ³SULPDU\´ 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 a 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 of 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” or “fundamental principle” in a 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 by a general phrase on the existence RI D ³F R P P R Q ´ 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 its norms do not exist in the void but instead inscribe themselves in the ³F R P P R Q ´S D W W H U Q

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 W Z R ³% D V L F ´. As far as specific language is concerned, we would prefer the definition of practice D V ³V H W W O H G ´Q U D W K H U D O ´ V L Q F H W used precisely in the decision of the International Court of Justice in the case of ³& R Q W L Q H Q W D O V K H O I´ It seems that the word ³1 R U W K 6 H D ´ U D O too light in this context.

We should like also to support the conclusion by the Commission that the rule

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 ³7KH SUDFWLFH PXVW EH JHQHU ODQJXDJH ³ERWK H[WHQVLYH DQG YLUWXDOO\ XQ international &RXUW RI -XVWLFH RQ WKH ³&RQ instead of such qualifiers VKHO DWV ³XIILFLHQWO\ ZLGHVSU 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 relatively short period of time. But can we make generalizations on this basis?

&RQFOXVLRQ ³)RUPV RI HYLG (opinio juris) once DFFH 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 note 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

dispute as it is