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Identification of Customary International Law
Crimes against Humanity
Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Statement by

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Mr. Chairman,

Today, the delegation of the Czech Republic will address three topics covered by chapters VI, VII and VIII of the Commission's report.

We welcome the progress that the Commission made on the topic of **identification of customary international law** on the basis of three outstanding reports of the Special Rapporteur, Sir Michael Wood. Sixteen articles provisionally adopted by the Drafting Committee this year provide an overall picture of possible final outcome. We are content both with the general direction of the work on this topic and the content of conclusions prepared so far. While waiting for the completion of the first reading next year, we wish to offer some comments, in particular on conclusions formulated on the basis of proposals contained in the Third report of the Special Rapporteur.

*New paragraph 2 in **Draft Conclusion 3 [4] concerning the assessment of evidence for the two elements** adds to clarity of this conclusion, by stressing that each of two elements – general practice and opinio juris – is to be ascertained, and that this generally requires an assessment of specific evidence for each element. The requirement of assessment of "specific" evidence for each element implies, in our view, that each of two elements must be ascertained and proven to exist, that one would not suffice without the other. We therefore wonder whether it is necessary to explicitly request, as the first sentence of this paragraph does, that each element is to be ascertained "separately" and introduce unnecessary rigidity in the process. The commentary might be a better place for further explaining how the ascertainment of each element should be conducted.*

The commentary should also elaborate on the newly added element of "the nature of the rule" to which regard must be had in assessing evidence in order to ascertain presence of two elements of the custom.

Concerning **Draft Conclusion 4 [5] on the requirement of practice,** we agree with the first part of newly included paragraph 3, dealing with the conduct of actors other than states or inter-governmental organizations that the "conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law". We appreciate that, the ICRC, so often mentioned in discussions concerning the problem dealt with in this paragraph, is an influential actor in international arena and, due to its unique role, its activities may impact on the conduct of states concerned. However, the ICRC example does not justify generalization of something which is rather exceptional and not typical for the large and diversified category of "other actors". It would suffice, in our view, that the commentary explain how the activities of non-governmental actors may eventually contribute to collecting the evidence of practice referred to in paragraphs 1 and 2 of Draft Conclusion 4 [5] or ascertaining such practice.

***Draft conclusion 12** deals with a question of the relationship of treaty rules and customary law rules of the same content. The three sub-paragraphs a), b) and c) enumerate three typical situations in which the "overlap" between "the treaty rule" and "the rule of customary law" of the same content may occur. One of these scenarios envisages situation of pre-existing customary rule which has been "codified", two other scenarios envisage situations when conclusion of the treaty preceded the emergence of the rule of customary law, and the treaty thus contributed to the settlement of the rule of customary law in one or other way: <u>either</u> the practice of treaty parties contributed to completion of "general practice" which is required for final stabilization of already crystalizing rule of customary law; <u>or</u> the practice of treaty parties gave rise to a completely fresh practice which later prevailed even*

outside the framework of treaty relationship and evolved into "general practice" as one of two elements of international custom. Obviously, only once these two processes under b) and c) come to a completion, the concurrence between the treaty rule and the rule of customary international law occurs and the treaty may then be of assistance in determination of the content of the rule of customary law. However, ascertaining when the treaty parties acquired the sense of being under legal obligation to extend the treatment required by the treaty also to non-parties to the treaty and having the right to require the same treatment from these states is a problem in itself.

Concerning the terminology, we note the use of the verb "reflect" when describing the relationship between the treaty rule and the rule of customary law of the same content. While the use of this verb seems to be entirely appropriate in the context of "codification", it is less appropriate in the situations when the treaty rule precedes the emergence of the rule of customary law of the same content. Some thoughts could eventually be given also to this aspect.

Concerning **draft conclusion 13 Resolutions of international organizations and inter-governmental conferences,** we agree with the basic observation in paragraph 1 that resolutions adopted by an international organization or at an intergovernmental conference cannot, in and of themselves, constitute a rule of customary international law. Incidentally, the same is true for treaties, even if conclusion 12 on treaties does not mention it.

Comparison of draft conclusions 12 and 13 reveals that there was an effort to underline the difference between treaties and resolutions. Undoubtedly, treaties are legally binding while the resolutions or decisions of international organizations, in principle, are not. In this sense the treaties, as one of the main sources of international law, range on the same level as international custom, while the resolutions do not. But how much is this relevant for the question of identification of customary international law? Neither the treaty nor a resolution can of itself create a rule of customary law. Then the question remains what kind of evidence can one or the other provide in order to ascertain whether the rule of customary international law exists and what is its content.

Most treaties, and in particular the bilateral ones, as well as most resolutions are of little help in the process of identification of customary international law. They do not touch upon issues which might be of relevance for such identification. However, when it comes to conventions aiming at codification and progressive development of international law, but also resolutions, particularly those delivering declarations aiming at codification of international law, one should not overlook the fact that the treaties and resolutions are often part of a single continuous process which may eventually generate emergence of rules of customary international law. This was, for example, the case of the 1963 Declaration of legal principles governing uses of outer space and 1967 Outer space Treaty, two instruments which were precursors of any rules of customary international law which may exist in this field today. We would therefor suggest outmost prudence when juxtaposing the treaties and resolutions as far as their significance for providing evidence of customary law is concerned.

*Concerning **Draft conclusion 15 Particular customary international law,** we note with satisfaction both the definition contained in paragraph 1 and the basic statement in paragraph 2 mirroring the draft conclusion 2[3] on two constituent elements. It is our understanding that also other conclusions concerning general customary law apply, as appropriate, to the way in which the existence and content of rules of particular customary international law are to be determined.*

***Draft conclusion 16 on persistent objector** deals with an important element concerning the scope of application of a specific rule of customary international law. While it*

does not directly relate to the question of identification of customary international law, it usefully adds to a broader picture of the topic.

Mr. Chairman,

The Czech Republic welcomes the first set of draft articles on the topic "**Crimes against humanity**" and would like to express its appreciation to the Special Rapporteur, Mr. Sean D. Murphy, for his outstanding contribution to this progress .We consider the draft articles, provisionally adopted at this year's session of the Commission, to be non-controversial, as they reiterate provisions of legal instruments largely adhered to by states and take into account relevant jurisprudence of international courts.

My delegation notes with satisfaction that the definition of the crimes against humanity, as contained in the draft article 3 provisionally adopted by the Commission, mirrors *verbatim*, except for necessary contextual changes, the definition of crimes against humanity contained in Article 7 of the Rome Statute of the ICC which already received wide acceptance and is increasingly seen as a codification of customary international law of crimes against humanity.

Our delegation also welcomes the provisional adoption of draft article 4 on obligation of prevention of crimes against humanity. This provision addresses one of important missing pieces in global efforts aimed at suppression of crimes against humanity. The general formulation of draft article 4 covers all preventive measures which are specified and further explained in the commentary to this article. Nevertheless, my delegation wonders whether this provision should not be made more robust by incorporating some of these preventive measures directly in the text of the draft article.

In addition, we are of the opinion that the ongoing work in other fora, in particular the proposal by the Governments of Argentina, Belgium, the Netherlands, Senegal and Slovenia to elaborate a multilateral treaty on mutual legal assistance and extradition in domestic prosecution of atrocity crimes, as well as the Crimes against Humanity Initiative of Whitney R. Harris World Law Institute, offer an important source of inspiration for the Commission's work on this topic.

Mr. Chairman,

We note with interest further progress in Commission's work on the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**". On the basis of the 3rd report of the Special Rapporteur Mr. Georg Nolte, the Commission adopted draft conclusion 11 on treaties that are constituent instruments of international organizations.

The commentary accompanying this draft conclusion provides useful background for understanding and analysis of questions concerning subsequent agreements and subsequent practice as a means of interpretation of such constituent instruments.

We agree with the premise of conclusion 11 reflecting two main elements of article 5 of the Vienna Convention on the Law of Treaties; first, that provisions of article 31, para 3 (a) and (b) as well as article 32 of the Vienna Convention apply also to interpretation of any treaty which is constituent instrument of an international organization, and a fortiori to a particular aspect of such interpretation concerning the subsequent agreements and practice in the application of these constituent instruments; second, that this rule is without prejudice to any relevant rules of the organizations in question. Conclusion 11 contains both elements. However, they are stated separately in paragraphs 1 and 4 of the draft conclusion 11. In our view, there is no reason for separating them. Due to their intrinsic character, they should

appear together in one place, namely in paragraph 1 of the draft conclusion. This would better convey the thrust of article 5 of the Vienna Convention. This change would also render paragraph 4 of the conclusion unnecessary.

Paragraph 2 of conclusion 11 deals with subsequent agreements and practice in the meaning of article 31, para 3 (a) and (b) of the Vienna Convention, as well as with other subsequent practice pertaining to the realm of article 32 of the Convention from the perspective of the environment in which they are generated and in which they manifest themselves. The content of this paragraph is limited to mere observation that, these subsequent agreements and practice "may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument". The conclusion does not provide any further guidance for identification of such subsequent agreements or practice, or for making the distinction between, on one hand, the practice of States as treaty parties – which is the only relevant practice for the purpose of article 31, para 3 – and, on the other hand, the practice of organization as such.

We agree that regarding treaties which are constituent instruments of an international organization, subsequent agreements and practice in the meaning of article 31, paragraph 3 (a) and (b), may emerge from a rather complex process within the organization. No doubts, these agreements or practice may be generated in connection with the developments within the organization or in the framework of its activities, and may manifest themselves in various forms in the overall process of organization's functioning. As the commentary to conclusion 11 underlines, in this process States act as members of the organization but, at the same time, also as parties to the treaty which is constituent instrument of the organization.

Looking for guidance for the distinction between their conduct in these two capacities, it seems useful to recall what is already stated in paragraph 1 of conclusion 6, namely that "[t]he identification of subsequent agreements and subsequent practice [...] requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty".

Subsequent agreements and subsequent practice of the parties may be very closely inter-related with the practice of the organization as such. In similar cases, as stated by WTO Appelate Body, „[t]he characterization of a collective decision as an "authentic element of interpretation" under article 31 (3) (a) is only justified if the parties of the constituent instrument of an international organization acted as such, and not, as they usually do, institutionally as members of the respective plenary organ.".

The commentary provides a number of examples containing elements which should still be explored. We encourage the Special Rapporteur and the Commission to further reflect on this matter and eventually formulate additional paragraphs of conclusion 11, building on these elements.

Thank you, Mr. Chairman.