



# CZECH REPUBLIC

Permanent Mission of the Czech Republic to the United Nations

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**Agenda Item 83**

**Report of the ILC:  
Cluster III: Chapters IX, X and XI:  
Protection of the environment in relation to armed conflicts  
Immunity of State officials from foreign criminal jurisdiction  
Provisional application of treaties**

**Statement by**

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Mr. Chairman,

The Czech delegation will today focus on Chapters IX, X and XI of this year's report of the International Law Commission.

Following the invitation contained in Chapter III of the Report of the International Law Commission on the work of its 66th session (2014) the Czech Republic provided information which the Commission requested in relation to the topic "**Protection of the environment in relation to armed conflicts**". There is no national legislation in my country relevant to this topic and there is also no case law on disputes concerning environment in relation to armed conflicts.

Obligations arising for the Czech Republic from treaties relating to prohibition of the use of methods and means of warfare that cause widespread, long-term or severe damage to the environment, including the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques of 1976, are directly applicable to armed forces on the basis of Article 10 of the Constitution of the Czech Republic. As such, they are integral part of the overall obligation to respect the law of armed conflicts and international humanitarian law. *Relevant Regulations of Czech Armed Forces contain further more concrete provisions regarding protection of the environment in the context of armed conflicts, together with more specific obligations aimed at protection of the population, cultural heritage, etc.*

We took note of Commission's debate under this topic on the basis of the Second report of the Special Rapporteur Ms. Marie Jacobsson. It seems, both from the report and the debate, that the information on views and practice of States was heterogeneous and that it was not clear to the Special Rapporteur and to the Commission what conclusions could be drawn from it. In our view, this may be due, at least in part, to the lack of clarity about the overall orientation and goal of Commission's work on this topic. In our view, the Commission should therefore address the very question of what is the current need of the international community in this field and what would be an adequate means to respond to this need. There should be clarity in this respect before the Commission moves further with the formulation of draft principles.

Mr. Chairman,

The Czech Republic welcomes further progress in the Commission's work on the topic of the "**Immunity of State officials from foreign criminal jurisdiction**" on the basis of the Fourth report of the Special Rapporteur, Ms. Concepción Escobar Hernández. The Commission focused its attention on the material and temporal scope of immunity *ratione materiae*. Concerning draft article 2, subparagraph (f) and draft article 6 provisionally adopted by the Drafting Committee, we would like to provide some comments, taking into account discussions of the Commission as reproduced in the report.

*Czech delegation agrees with the principles expressed in the draft article 6 defining the scope of immunity ratione materiae, as provisionally adopted by the Drafting Committee. We also agree with the premises which, even if not expressly formulated in the draft article, form the basis and context of immunity ratione materiae, namely that the distinction between "acts performed in an official capacity" and "acts performed in a private capacity" has to be clearly distinguished from the distinction between acta iure imperii and acta iure gestionis.*

*We note that the Drafting Committee provisionally adopted the draft article 2 (f) containing a definition of an act performed in an official capacity. However, we share the view of some of members of the Commission that it should be further considered whether there is a need for any such definition at all: the question is whether the current draft definition in article 2 (f) adds any substance and specificity to the notion which should be defined. The act performed in an official capacity is a phrase which has already been used in several important multilateral treaties, such as the Vienna Convention on Diplomatic Relations, in order to distinguish the official acts from the acts performed in a private capacity. The phrase has not been defined in these instruments, yet its legal meaning is clear and its application seems to pose no problems.*

With reference to the discussion, we believe that the relationship of the criteria of attribution of State responsibility to the scope of the immunity *ratione materiae* requires further detailed analysis. We agree that not all of the criteria for the attribution contained in articles 4 to 11 of the Articles on the responsibility of States might be relevant in this regard, due to the fact that the scope of the immunity *ratione materiae*, covering only acts performed by State officials in their official capacity, is narrower than the material scope of articles on attribution for the purpose of responsibility of States. However, criteria of attribution concerning the conduct of State officials, including article 7 which deals with conduct in excess of authority or contravening the instructions, have to be taken into account when considering the immunity *ratione materiae* of State officials. *As expressed by the House of Lords in its decision in the case of Jones versus Saudi Arabia of 14 June 2006, „the circumstances in which a State will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law, ... including the cases when the state is liable for acts done under colour of public authority, whether or not they are actually authorized or lawful under domestic or international law“. On the other hand, as pronounced by the European Court of Human Rights in the same case, “there is no doubt that individuals may in certain circumstances also be personally liable for wrongful acts which engage the State’s responsibility, and that this personal liability exists alongside the State’s liability for the same acts. This potential dual liability is reflected in Article 58 of the Draft Articles, which provides that the rules on attribution are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of the State.”*

The question of *de facto* officials acting under governmental direction and control also requires a thorough analysis within the context of the scope of immunity *ratione materiae* keeping in mind that the *raison d’être* of immunity *ratione materiae* is the nature of the acts performed.

The analysis of issues concerning the relationship between the scope of the immunity *ratione materiae* and the attribution of conduct under Articles on State responsibility should be also conducive to clarifying the complex question of limitations and exceptions to immunity *ratione materiae*.

Mr. Chairman,

On the basis of the Third report of the Special Rapporteur Mr. Juan Manuel Gómez-Robledo, the Commission continued its consideration of the topic “**Provisional application of treaties**”. It referred to the Drafting Committee six draft guidelines proposed by the Special rapporteur. We also note that the Commission had before it a memorandum prepared by the Secretariat, on provisional application of treaties between States and International

Organizations or between International Organizations. We will reserve our comments on individual guidelines after they are adopted by the Commission together with commentaries.

Three reports of the Special Rapporteur submitted so far touched upon a large spectrum of problems related to provisional application. For a successful consideration of the topic it is therefore important that the exercise remains focused on those aspects of provisional application, which are common for most of treaties. *Specific issues which are proper to some categories of treaties or treaty provisions, such as for example those concerning the establishment of international organizations should be left aside at this stage.*

The Commission should also remain focused on international dimension of provisional application. *While it is true that limitations resulting from their internal law will always be in mind of States when negotiating a treaty which could eventually be applied provisionally, it is primarily their responsibility to either satisfy their domestic law requirements in this respect prior to agreeing to provisional application, or not to consent to provisional application or, as the case may be, to take steps necessary to prevent being considered as a state which implicitly gave its consent to its participation in provisional application of the treaty.* Giving any relevance, on international level, to provisions of domestic law concerning provisional application of treaties would be a significant departure from the regime of the Vienna Convention on the law of treaties.

As with some other topics currently under Commissions consideration, clarification of many issues relating to provisional application will be a matter of interpretation of the treaty in question, in accordance with article 31 of the Vienna Convention. *This interpretation will clarify not only whether provisional application should encompass the treaty as a whole or only certain treaty provisions, when the provisional application starts or when and how it ends, but also a question whether, in the absence of an explicit provision envisaging provisional application, an implicit agreement concerning provisional application can be ascertained taking into account treaty provisions in their entirety as well as relevant circumstances concerning the negotiations of the treaty.*

*Whether formulated as guidelines or conclusions, Commission's findings in this respect will have to be of limited relevance for the process of such interpretation which is owned by the States participating in the treaty.*

Commission, however, can usefully contribute to the clarification of several elements of the concept of provisional application. *Some of them may be common to bilateral and multilateral treaties; others may arise only in connection with provisional application of multilateral treaties,*

Provisional application of a treaty or some of its provisions is above all an "application" of the treaty. The nature of rights and obligations envisaged by the treaty is not altered by their implementation/realization as part of provisional application. The obligations in question are real legal obligations, even if the basis for their implementation is "provisional". They acquire their binding character at the latest in the moment when the provisional application is supposed to start. As a consequence, the breach of a treaty obligation in course of provisional application is subject to rules governing international responsibility. In this respect we endorse the view of the Special Rapporteur as reflected in his draft guideline 6.

As the provisional application of a treaty as such is not just an option available for unilateral choice of States or a courtesy that the States simply reciprocate, but a firm legal commitment within the realm of principle "*pacta sunt servanda*", unilateral termination of provisional application, in violation of conditions for such termination, amounts to a breach of an international obligation which also entails international responsibility. What are these conditions is again the matter of interpretation of the treaty in question.

Another important aspect which would deserve clarification concerns the circle of States between which the obligations arising from provisional application apply. Undoubtedly they apply in relation between States which agreed to provisional application. In the case of a multilateral treaty which, during the period of its provisional application entered for some of these States in force, the treaty provisionally applicable between remaining States will apply also in their relations with those States which became treaty-parties. *This should also be the case of international organizations, if the treaty is open to participation of both the States and international organizations.*

Concerning the relationship between article 25 on provisional application of treaties and other articles of the Vienna Convention, we are of the view that the Commission should limit its attention to situations for which there exist sufficient international practice. In the absence of practice revealing problems in the application of respective articles of the Convention, there is no need for abstract discussions.

Thank you, Mr. Chairman.