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REPORT OF THE INTERNATIONAL LAW COMMISSION

PROTECTION ON PERSONS IN THE EVENT OF DISASTERS
IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW
SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

Statement by

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Mr. Chairman,

In the present statement, the Czech Republic would like to focus on the Chapters IV, V and VI of this year's report of the International Law Commission. In order to save time, I will read only the key parts of our statement; its complete text will be available in writing.

The Czech Republic welcomes the final draft articles on the topic **"Protection of persons in the event of disasters"** and would like to express its appreciation for the outstanding work done by the Special Rapporteur, Dr. Eduardo Valencia-Ospina, which led to the adoption of the draft articles on second reading this year. We recognize the importance of the draft articles for complementing instruments already existing in the area of disaster response and prevention. In particular, we appreciate that the Commission struck the balance among the principles of non-intervention and sovereignty on the one hand and, on the other hand, the humanitarian principles and human rights that guide the provision of assistance by the assisting actors to the affected State and are a cornerstone of these draft articles.

We welcome most of the changes that were made in the draft articles and commentaries to them on second reading, as they generally bring more clarity to the text and provide better guidance for the relevant actors. Although not all of our previous comments and observations are reflected in the final draft articles, we especially appreciate the new wording of the draft article 18 regarding the relationship of the present draft articles to other rules of international law, especially to the rules of international humanitarian law. On the other hand, we believe that commentaries to certain draft articles could be more elaborated, as for instance commentary on the concept of serious disruption of the functioning of society. Further, we do not consider as appropriate the explicit reference to the unlimited possibility of termination of external assistance at any time in the draft article 17. Although the Czech Republic understands that such termination might be needed by both the affected State as well as assisting actor, we are of the opinion that such a provision, in its current wording, might be to the detriment of the persons affected by the disaster. We feel that contrary to the aim of the draft articles it might lead to a termination of assistance in a very short time before new assisting actor can fill the gap by offering its assistance.

As regards the future form of the draft articles, we do not consider as necessary, at this stage, to elaborate a convention on the basis of the draft articles.

Mr. Chairman,

We congratulate the Commission on the adoption in the first reading of the set of 16 draft conclusions on the topic **"Identification of customary international law**" prepared on the basis of four reports submitted by the Special Rapporteur, Sir Michael Wood. We commend the Special Rapporteur for the outstanding quality of his reports and for his scholarly guidance during Commission's work on this topic. We note also the valuable contribution of the Codification division, namely the Memorandum on the relevance of decisions of national courts in the process of determination of customary international law by international courts and tribunals of universal character.

Together with international treaties regulating ever growing range of international relations, customary international law remains a key component of the contemporary international legal order. Complexity and dynamics of development of todays' international

legal and political arrangements impact also on the process of crystallization of customary international law and often make the identification of customary norms of international law and their content an uneasy task. The outcome of Commission's work on this topic provides an important tool both for practitioners and scholars who are challenged with intricate issues of determination of rules of customary international law.

We appreciate that the Special Rapporteur and the Commission put the process of determination of norms of customary international law and their content in the center of the topic and focused solely on the methodological issue on how the rules of customary international law are to be identified. This purpose is clearly stated in draft conclusion 1 and convincingly justified in the commentary.

Draft conclusion 3 is highlighting the need for an assessment of evidence for each of the two constituent elements, namely general practice and the *opinio iuris.* It addresses one of those important aspects of the process of determination of the rules of customary law, which - on one hand - may be considered as self-evident, but - on the other hand - is often ignored. In view of a quite spread tendency (including in various multilateral fora) to allege the existence of a particular rule of customary international law primarily by virtue of an argument focusing on one of the two constituent elements only, we consider draft conclusion 3 to be of particular relevance. We also appreciate further clarification provided in the commentary regarding the phrase in paragraph 1 of the conclusion, stating that "… regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found". It is our understanding that all three conditions apply equally to the assessment of the general practice as well as of the *opinio juris*.

Concerning draft conclusion 4, we support, in principle, the weight given to the practice of States in formation, or expression of the rules of customary international law, as well as the nuanced formulation concerning the practice of international organizations in this respect. We also appreciate the clarifications in the commentary to this draft conclusion, relating to the conduct of other actors which does not constitute the practice contributing to the formation, or expression of the rules of customary international law. The examples of situations in which the conduct of other actors may be of assistance in ascertaining the practice of States or international organizations are helpful. On the other hand, it is to be noted that the Commission, in its previous work, most recently represented by the 2011 draft articles on the responsibility of international organizations, consistently separated rules relating to States from rules relating to international organizations. Therefore, the Commission could, in its future discussions on this topic, consider in more detail all aspects of inclusion of the practice of international organizations in the framework of the draft conclusions. In this context, the Commission could clarify whether States and international organizations are all part of unified system of customary international law or whether two or more subsystems exist and the ramifications of these different concepts for the determination of the existence and content of rules of customary international law.

Draft conclusions 5 and 6 addressing both the scope of the State practice (i.e. conduct of the executive, legislative and judicial branches) and various forms that such practice may take are illustrative enough. While we agree with the content of paragraph 3 of the draft conclusion 6 that there is no predetermined hierarchy among the various forms of practice, we also appreciate the observation in the commentary that "in particular cases, […] however, it may be that different forms or instances of State practice ought to be given different weight when they are assessed in context". It might be worth considering possibility of adding this element of the commentary to the text of the draft conclusion itself.

Draft conclusions 7 and 8 together show the complexity of the whole process of ascertaining the existence of one of the two constituting elements of the rule of customary international law, namely general practice. First focus is on the assessment of the practice of a single State as part of a broader picture (mosaic) of international practice which, in its entirety, subsequently allows identification of prevailing trends and eventually provides evidence for the existence of general practice. In view of rather laconic nature of conclusions themselves, parts of the commentaries to these conclusions (such as those) concerning possible discrepancies in the practice of a particular State, notion of generality of the practice, or the time element of the evolution of general practice, assorted with numerous references to international jurisprudence, are particularly instructive and valuable.

Two conclusions of Part Four dealing with opinio juris are inseparably linked with the previous two conclusions on general practice. We agree with the Commission that not every practice, even if sufficiently widespread and followed consistently by a representative number of States, is a testimony of existence of a rule of customary international law. Draft conclusions 8 and 9 address properly the "subjective" element of the customary international by underlining that "the practice in question must be undertaken with a sense of legal right or obligation" and not to be just a "mere usage or habit". As rightly stated in para 4 of the Commentary to conclusion 9, also simple sense of duty to comply with treaty obligations does not amount to evidence of the opinion juris for the purpose of identification of customary law. (Eventually this element could also be elevated directly in the text of the conclusion.)

As regards draft conclusion 10, paragraph 3, the aspect of failure to react over time to a practice of other States as possible form of evidence of *opinio juris* deserves, in our opinion, further detailed consideration. We are not convinced that the current wording of this conclusion sufficiently protects States, which do not openly object to certain practice of other States, from being incorrectly regarded as accepting a developing customary rule. It should be taken into account that failure to react has different significance depending on the extent and degree to which the rights and obligations of a State are affected: States usually formulate open objections or protests when the relevant practice directly and significantly affects their concrete interests; on the other hand, in situations when certain practice affects large group of States or all States, the assessment whether and how to react to such practice is more varied. In addition, the failure to react has to be seen in the overall context of the situation, in particular when the State not reacting to other State's conduct otherwise consistently follows different practice in its own conduct vis-à-vis other States.

We note with appreciation commentaries to draft conclusions 11 to 14 concerning significance of treaties, resolutions of international organizations and conferences, decisions of courts and tribunals and teaching of qualified publicists, as well as draft conclusions 15 and 16 concerning persistent objector and particular customary international law. However, as regards draft conclusion 16, the Commission should clarify paragraph 5 of its commentary according to which particular customary law can develop not only on regional, sub-regional or local level, but also among States linked by a "common cause", interest and activity other than their geographical position. The commentary to this conclusion should describe in more detail relevant legal concepts and concrete examples of this type of particular customary law. In addition, the conclusion should make clear that any rule of particular customary law, which operates only among the particular group of States, cannot create either obligations or rights for a third State without its consent.

Mr. Chairman,

We commend the Commission on the adoption in the first reading of 13 draft conclusions with commentaries on the topic **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"**. We appreciate, at this occasion, important contribution of the Special Rapporteur, Professor Georg Nolte, to this success, including through his Fourth report on the topic, on the basis of which the Commission adopted draft conclusions 1 and 13.

On a general note, draft conclusion 1 on the scope provides that "[t]he present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties." The commentary to this draft conclusion further explains that the draft conclusions are based on the Vienna Convention of the Law of Treaties of 1969. In view of the fact that the mentioned Vienna Convention deals with the treaties between States, it would be appropriate that this element be also properly reflected in the text of the conclusion. Indeed, it should not be assumed that the conclusions reached by the Commission concerning the role that subsequent agreements and subsequent practice may play in the interpretation of treaties between States could be all automatically transposed also to treaties between States and international organizations or between international organizations. Relatively low number of such treaties (compared with the amount of treaties between States) and scarcity of cases in which the issues in question have arisen in relation with treaties with or between the international organizations, do not provide sufficient material for a credible study.

Our next comment is on Draft conclusion 13[12] concerning pronouncement of expert treaty bodies, also newly adopted at the last session of the Commission. The key provision of this conclusion is paragraph 2, which states that "[t]he relevance of the pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty", thus stressing the primacy of the rules of the treaty in question. We fully subscribe to this conclusion.

Paragraph 3 addresses several aspects of the pronouncement which I will take in different order then the one in which they appear in paragraph 3 of the draft conclusion.

First aspect, as we see it, is the statement of the fact that the pronouncement of an expert treaty body – subject to relevant treaty provisions – may in itself constitute "other subsequent practice" under article 32 of the Vienna Convention but not a subsequent agreement or subsequent practice by parties under article 31, paragraph 3. We concur with this conclusion.

The second aspect is the situation in which "the pronouncement of an expert treaty body may give rise to subsequent agreement or subsequent practice by parties under article 31, paragraph 3", with an important clarification that mere "silence by a party" in reaction to such pronouncement, however "shall not be presumed to constitute subsequent practice under article 31 paragraph 3 (b)", in sense of "accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body". These segments should appear together in a coherent text which would be easy to read.

Mentioning in the same place also the situation in which the pronouncement of an expert treaty body "may refer to" a subsequent agreement or subsequent practice by parties under article 31, paragraph 3 (as paragraph 3 of the draft conclusion 13 currently does), is overburdening this paragraph and may even lead to a confusion. As explained in the commentary, phrase "may refer to" covers the situation in which the subsequent practice or

agreement of the parties have developed before the pronouncement, contrary to the situation in which the pronouncement was the catalyst for such practice. There is no reason to mention the "refer to" eventuality in a paragraph which substantively deals with and clarifies only the second eventuality. It would suffice to explain the difference between two situations in the commentary, or deal with the "refer to" situation in a separate paragraph.

Concerning paragraph 4 of this conclusion, we don't see raison d'être for its inclusion and question very purpose of the "without prejudice clause" in the set of non-binding conclusions. Moreover, as currently formulated this paragraph is not easy to comprehend, even with the explanations in the commentary. We recommend its reconsideration.

Finally, I would like to commend the Commission for adding two relevant topics on the long-term programme of work, in particular the succession of States in respect of State responsibility.

Thank you, Mr. Chairman.