



CZECH REPUBLIC

Permanent Mission of the Czech Republic to the United Nations

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**PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS
IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION**

Statement by

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Mr. Chairman,

In the present statement the Czech Republic would like to focus on the Chapters X and XI of this year's report of the Commission. As previously, in its oral statement, the Czech delegation will limit itself to comments on the salient points of the topics mentioned above; the complete text of the statement will be available in writing.

We took note of Commission's work on the topic "**Protection of the environment in relation to armed conflicts**" on the basis of the 3rd report of the Special Rapporteur, Dr. Marie G. Jacobsson, whom we commend for her contribution to this effort. *The 3rd report focused on identifying several rules for both the pre-conflict and post-conflict situations, as well as the particular situation of indigenous peoples, including a number of proposals for new draft principles.*

We note that the Commission referred draft principles contained in the 3rd report to the Drafting Committee. We also note that it referred back to the Drafting Committee the draft introductory provisions and draft principles contained in the report of the Drafting Committee that the Commission had taken note of during its last year's session. We will limit our comments only on those draft principles that were adopted by the Commission together with commentaries.

Concerning draft principles 1 and 2 dealing with the scope and purpose:

While we consider it indeed necessary that the Commission explains the real purpose of its work on this topic, in our view, the draft principle 2 does not do it. It provides, that "[t]he present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures", without explaining how this goal could be achieved by means of a legally non-binding text.

Concerning draft principle 1 on the scope - we are surprised that the Commission considered it necessary to deal, on the level of principles, with such a technicality as temporal scope of their application. Moreover, taking into account the fact that the Commission is not preparing a draft of a potentially legally binding instrument, we do not consider it appropriate to introduce in the text the notion of "application". Because the temporal element is sufficiently clear already from the titles or content of the proposed draft principles, we see no need for the draft principle 1.

Instead of draft principles 1 and 2, a simple statement clarifying scope (i.e. subject matter) of draft principles would suffice.

Prima facie, we have no problem with the content of draft principles 5, 9, 10, 11, 12 and 13. We note, however, that while draft principles 5 and 19 deal with areas of major environmental and cultural importance, principles 9 to 12 deal only with the environmental aspect. We therefore reserve our final position on these draft principles for the stage when we can see them also in the context of other proposed principles.

Mr. Chairman,

With regard to the topic of „**Immunity of State officials from foreign criminal jurisdiction**“, the Czech Republic appreciates this year's report presented by the Special Rapporteur for this topic, Professor Concepción Escobar Hernández. The report contains extensive analysis of well-documented examples of State practice concerning exceptions to the immunity of State officials from foreign criminal jurisdiction. Since the debate at this year's session of the Commission was only the beginning of the deliberation on this legally complex topic, our delegation will limit itself to a few preliminary comments concerning this year's report of the Commission.

Firstly, as regards the exceptions to immunity *ratione materiae* of State officials from foreign criminal jurisdiction, it might be sometimes an uneasy task to identify clearly established rules of customary international law, since relevant practice of States in this area is varied to some extent and relevant legal issues are complex and sensitive. Nevertheless, the Czech Republic shares the view of the Special Rapporteur and some other members of the

Commission that there appears to be a clear trend in the practice of States, reflected also in the doctrine, which supports the existence of an exception to immunity *ratione materiae* from foreign criminal jurisdiction when crimes under international law, namely the crime of genocide, war crimes and crimes against humanity, as well as other official crimes defined in relevant treaties, are committed. In our opinion, this trend seems to be, in principle, duly reflected in draft article 7 (a), as presented by the Special Rapporteur.

As regards the “territorial tort exceptions”, referred to in draft article 7, paragraph 1, subparagraph (c), as presented by the Special Rapporteur, it seems that the decisive factor for its application would be the territorial aspect, i. e. the connection to the territory where such an „official crime“ was committed, rather than the gravity of such crime, as in the case of the general exception to immunity ratione materiae mentioned above. According to the doctrine, examples of crimes which would be covered by such territorial exception to immunity are espionage, acts of sabotage, kidnapping or political assassinations committed in the territory of a forum State, but it seems that also other „official“ criminal activity on the territory of the State concerned could fall within this exception. In this regard, it seems that it is not clear what would be the relationship of this territorial exception and the immunity ratione materiae, provided for in various international conventions, such as in article 39, paragraph 2 of the Vienna Convention on Diplomatic Relations or in article IV, section 12 of the Convention on the Privileges and Immunities of the United Nations. The delegation of the Czech Republic would appreciate further comments on this issue by the Commission.

The Czech Republic notes that the Commission provisionally adopted the draft articles 2, subparagraph (f) and draft article 6 and the commentaries to these articles. We already provided a few comments on these articles in its last year’s intervention. As regards draft article 2 (f) on an “act performed in an official capacity”, we still remain unconvinced that the definition is necessary and that it adds any substance and specificity to the notion which should be defined. *As our delegation mentioned last year, the category of acts performed in an official capacity has already been used in several important multilateral treaties in order to distinguish the official acts from the acts performed in a private capacity. These instruments do not contain any definition of this category of acts, yet this fact does not seem to pose problems in the practical application of relevant provisions of these instruments.*

As regards the commentary to draft article 2, subparagraph (f), we would appreciate further clarification of the Commission’s views on the relationship between the immunity *ratione materiae* and the attribution of conduct to a State under international law. We concur with the conclusion, expressed by the first Special Rapporteur on this topic and echoed in the Memorandum prepared by the Commission’s Secretariat, that there seem to be no objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other. Importantly, any differentiation between the concept of „official capacity“ for the purpose of State responsibility and for the purpose of immunity *ratione materiae* could, incorrectly, „give rise to an understanding of international crimes as acts that are not attributable to the State and can only be attributed to the perpetrator“,¹ thus eliminating the international responsibility of States for such official crimes. In addition, this principle of symmetry between the rules on attribution for the purpose of State responsibility and rules on immunity *ratione materiae* seems to be compatible with the application of suggested exceptions to immunity *ratione materiae*, namely the exception for crimes under international law and other treaty crimes subject to universal jurisdiction, as well as the „territorial tort exception“.

In addition, we are of the opinion that legal regime concerning de facto officials acting under governmental direction and control requires further analysis within the context of this draft article. As mentioned by the Commission in the commentary to draft article 2 (e) on the definition of State official, provisionally adopted at its sixty-sixth session in 2014, issues relating to de facto officials were expected to be addressed in connection with a

¹ Fourth Report of the Special Rapporteur, 67th session of the ILC, 2015, doc. A/CN.4/686, p. 54.

*definition of “acts performed in an official capacity”. It seems that such an analysis should take into account the principle which was expressed in previous discussions of the Commission and according to which the essence of immunity *ratione materiae* is the nature of the acts performed, rather than the individual who performs them.*

*To conclude, as regards the draft Article 6 on the scope of immunity *ratione materiae*, the delegation of the Czech Republic fully agrees with the main principles expressed in the draft article 6 and in the commentary, which describe the scope of immunity *ratione materiae* including its temporal element and relationship to immunity *ratione personae*.*

Thank you, Mr. Chairman.