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Protection of the atmosphere
Immunity of State officials from foreign criminal jurisdiction

Statement by

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Mr. Chairman,

Today, the Czech Republic will address two topics covered by Chapters VI and VII of the Commission's report.

Concerning the topic "**Protection of the atmosphere**", we wish to commend Mr. Shinya Murase for his commitment and dedication in carrying his responsibilities as Special Rapporteur for this topic.

Our reserved position towards the inclusion of this topic on the agenda of the Commission is known. As much as we sincerely believe that the problem of the climate change represents one of the most serious challenges that the mankind is facing, we are also convinced that a resolute action, which is urgently needed, requires full engagement of international instances other than the International Law Commission.

Special Rapporteur's fourth report focused mostly on the relationship between international law on the protection of the atmosphere and other fields of international law, namely international trade and investment law, the law of the sea and international human rights law. The real issue at stake here is the integrated approach to the problems underlying the climate change. It includes understanding and acceptance of scientifically proven relationship of various natural phenomena, such as interaction between oceans and the atmosphere, and impact of various human activities on the environment, leading or contributing to climate change. Obviously, the Commission has no competence to deal with the scientific, socio-economic and policy issues related with climate change, which are at the center of any strategy addressing challenges that the mankind is facing.

The problem of the relationship between the law on protection of the atmosphere and other branches of the international law is a different issue. The first question, which arises in this connection, is whether there is indeed a branch of international law that could be called "the law on the protection of the atmosphere". We are not convinced that it is the case. *Without embarking on academic discussion what are the criteria for defining a branch of international law, we are afraid that the work on this topic consists in repetition of procedural rules applicable in many other areas of international law, rather than in identification of any substantive rules or obligations unique to the protection of atmosphere. The obligation to cooperate or the principle of due diligence are not specific to the protection of the atmosphere. Also various treaties limiting transboundary pollution were drafted with the broader aim in mind, namely protection of the environment, not the protection of atmosphere as such. Likewise, other instruments, such as Paris Agreement, address the problem of the climate change, which can't be simply re-labeled as the protection of atmosphere.*

Moreover, the problem of inter-disciplinary relationship does not concern only the so-called law on the protection of atmosphere – it is a broader legal issue. The relationship between various fields of international law is governed by principles, and is routinely resolved by techniques, which do not differentiate the subject matter of the legal field in question. There is no reason to address this problem specifically in connection with the protection of the atmosphere.

The draft guideline 9 provisionally adopted by the Commission therefore raises several concerns. While we agree that "It is ... important that conflicts and tensions between rules relating to the protection of the atmosphere and rules relating to other fields of international law are to the extent possible avoided", we don't see the solution in the way suggested in first sentence of para 1 of guideline 9. The problem seems to us primarily as a problem of harmonization of the substantive obligations under various international legal instruments dealing with different subject matters, in the interest of a clearly defined and generally agreed policy. Such harmonization must first of all be preceded by identification of appropriate material and technical solutions for inter-connected problems, which may subsequently require the adoption of legal obligations or modification of existing ones. If the legal instruments are substantively contradictory, the problem can't be resolved by means of their idealistic re-interpretation.

The proposed guideline 9 suggests, in our opinion, an unworkable solution, which, among other things, disregards precisely those rules on interpretation of treaties to which the next sentence explicitly refers. The rules of Vienna Convention on the Law of Treaties apply to treaties individually. They do not aim at reconciling, by means of interpretation, an indefinite number of substantively incompatible instruments, which may also be binding on different groups of treaty parties. We therefore can't agree with paragraph 1 of guideline 9. On the other hand, paragraph 2 addresses the problem of harmonization of legal instruments in much more realistic manner and, in our opinion, represents the only workable element of guideline 9.

Mr. Chairman,

Let me now turn to the topic "**Immunity of State officials from foreign criminal jurisdiction**". The Czech Republic would like to express once again its appreciation to the Special Rapporteur, Professor Concepción Escobar Hernández, for her fifth report containing extensive analysis of well-documented examples of State practice on exceptions to immunity *ratione materiae.*

This year's discussions in the Commission on this report and on draft article 7, concerning the crimes under international law in respect of which immunity *ratione materiae* should not apply, clearly demonstrate that it is sometimes an uneasy task to identify established rules of customary international law, since relevant State practice may be varied and legal issues complex and sensitive. The exceptions to immunity *ratione materiae* seem to be an example of such a controversial issue. Having said that, the Czech Republic welcomes the adoption of draft article 7, since, in our opinion, the draft article, in principle, properly reflects the trend in State practice which supports the existence of an exception to immunity *ratione materiae* when crimes under international law, as well as other so-called official crimes defined in relevant treaties, are committed. The Czech Republic also appreciates that the commentary to this draft article elucidates in clear terms several aspects of this contentious issue.

As indicated in the Commission's commentary, it seems that the exceptions to immunity *ratione materiae* are, *inter alia*, based on the existence of jurisdictional regimes providing for the exercise of national extraterritorial criminal jurisdiction over crimes which are, as a rule, committed in an official capacity. These jurisdictional regimes, establishing also rules for international cooperation and judicial assistance between States, imply that State officials should not be able to invoke immunity *ratione materiae* for such crimes in criminal

proceedings before foreign courts. Therefore, it may be useful if the Commission further elaborated in more detail on the relationship between the concrete scope and application of extraterritorial criminal jurisdiction over these crimes, as reflected in the practice of States under relevant treaties and customary international law, and the respective exceptions to immunity *ratione materiae* from foreign criminal jurisdiction.

As regards the issues which are not contained in the draft article 7, the Czech Republic welcomes the decision *not to* include the crime of aggression and the crime of corruption in the text of draft article 7. It seems that the crime of aggression is subject to special jurisdictional regime, as reflected, *inter alia*, in the Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, according to which the crime of aggression should be subject only to the jurisdiction of competent international criminal court or of the national courts of the alleged perpetrator. As regards the crime of corruption, the Czech Republic shares the view, expressed in the commentary to this draft article, that corruption should not be regarded as an act performed in an official capacity and therefore does not need to be included among the crimes for which immunity does not apply.

In addition, the Czech Republic regards as prudent that the Commission did not include in the text of draft article 7 the exception concerning crimes committed by foreign officials in the territory of the forum State. The Czech Republic shares the view that these crimes are subject to the territorial jurisdiction of the forum State and, as such, should be dealt with, in principle, as any other ordinary non-official crime. However, in this context, it may be advisable to study in more detail the legal consequences of a situation in which the home State of the perpetrator would assume the responsibility under international law for the illegal act committed by his official in the territory a foreign State.

Lastly, the Czech Republic would like to highlight the conclusion by the Commission according to which the exceptions to immunity *ratione materiae* do not apply to or limit in any way immunity of State officials *ratione personae*. In its commentary, the Commision expressly mentions this principle with regard to customary immunity *ratione personae* of Heads of States, Heads of Government and Ministers of Foreign Affairs. The Czech Republic would like to add that the same principle applies also to immunity *ratione personae* enjoyed by persons connected with special missions, diplomatic missions, consular posts, international organizations and military forces of a State. The preservation of these immunities is guaranteed by the draft article 1, paragraph 2 of the present draft articles; however, it seems useful to reaffirm this fact in the commentary to draft article 7.

Thank you, Mr. Chairman.