



CZECH REPUBLIC

Permanent Mission of the Czech Republic to the United Nations

Check Against Delivery

72nd Session of the
General Assembly

Agenda Item 81

Report of the International Law Commission
Peremptory norms of international law
Succession of States in respect of State responsibility
Protection of the environment in relation to armed conflicts

Statement by

Ms. Kristina Horňáčková

Legal Adviser of the Permanent Mission of the Czech Republic
to the United Nations

New York, November 1st, 2017

1109 – 1111 Madison Avenue, New York, NY 10028
tel.: 1-(646)-981-4000, fax: 1-(646)-981-4099, www.mfa.cz/un.newyork

Mr. Chairman,

In the present statement the Czech Republic will focus on Chapters VIII, IX and X of this year's report of the Commission.

With regard to the topic "**Jus cogens**", the Czech Republic took note of the Commission's decision to change the title of the topic to "**Peremptory norms of general international law (Jus cogens)**". Further, we would like to thank the Special Rapporteur Mr. Dire Tladi for his Second report, which primarily sought to set out the criteria for the identification of peremptory norms. The Czech Republic welcomes that the Special Rapporteur took the 1969 Vienna Convention on the Law of Treaties as a point of departure. We are of the view that norms of jus cogens emerge only from State consent and they are being identified by the international community of states as a whole as peremptory norms. Therefore we support the draft conclusion 5 para 1 as contained in the interim report of the Chairperson of the Drafting Committee that "the most common basis for the formation of jus cogens" would be customary international law and we have doubts whether treaty provisions and general principles of law may also serve as basis for peremptory norms of general international law as is stated in paragraph 2.

Mr. Chairman,

Turning now to the topic "**Succession of States in respect of State responsibility**", the Czech Republic welcomes the Commission's decision to include in its program of work this topic and congratulates Mr. Pavel Šturma both for his appointment as Special Rapporteur and for the prompt submission of his first report on the topic.

Regarding the choice of the topic itself, we believe that it is time to subject to the scrutiny the old doctrinal dogma according to which the possibility to invoke responsibility for an internationally wrongful act committed either by or against the predecessor State stops at the door of State succession. This view, common in traditional literature and having still some advocates, was largely based on an understanding of "State responsibility" which was very different from the concept underlying the International Law Commission's Articles on responsibility of States for internationally wrongful acts. Furthermore, for some time now, it is also generally accepted that the succession of States does not necessarily produce a "clean slate" in international legal relations such as treaty relations and debts. Then, why should the State succession wipe out the consequences of an internationally wrongful act?

We concur with the Special Rapporteur's preliminary conclusion and are of the view that contemporary international law does not preclude succession in respect of secondary rights and obligations arising from an internationally wrongful act of the State, and we would encourage the Special Rapporteur to consider formulating a *general* provision encapsulating this thesis. This, of course, would be only a starting point in the more complex exercise aimed at answering the question whether there are emerging *specific* rules of international law supporting the devolution of secondary obligations or rights (as the case may be) arising from internationally wrongful acts of States in situations of State succession and what are the perspectives of their progressive development and codification.

Concerning draft article 1 (Scope), we are satisfied with its content as proposed by the Special Rapporteur and provisionally adopted by the Drafting Committee.

In view of the relationship between the present topic and previous work of the Commission on State succession and State responsibility, we agree with the need for using substantively identical definitions. It is vital for proper understanding of the provisions of different instruments and of their interaction. It is also a precondition for preserving the harmony between the outcome of Commission's work on the present topic and its previous work on related topics of State succession and State responsibility. In this respect we note with satisfaction that draft article 2 (Use of terms) incorporates *verbatim* the most relevant definitions of the 1978 and 1983 Vienna conventions on succession of States.

We are aware of the fact that the original proposal of the Special Rapporteur contained also the draft definition of the term "international responsibility". Unlike the two Vienna conventions, the Commission's Articles on the responsibility of States for internationally wrongful acts do not contain an article on use of terms, and accordingly, do not provide technical definition of the term "international responsibility" or "State responsibility". Even Article 28 of the 2001 Articles on responsibility of States, which specifies that "The international responsibility of a State which is entailed by an internationally wrongful act ... involves legal consequences ...", does not contain all elements needed for a meaningful definition. We therefore consider that the decision to omit the definition of the term "international responsibility" in draft article 2 is a right one. The Commission can simply work on the basis of an understanding that, as far as responsibility of States for internationally wrongful acts is concerned, it deals with the subject matter covered by its 2001 Articles.

As regards draft article 3 (Relevance of the agreements to succession of States in respect of responsibility), and draft article 4 (Unilateral declaration by a successor State), we are not convinced that they are needed. The mere fact that the two Vienna Conventions contain provisions of this kind is not a sufficient reason for including these provisions in the present draft articles. Unlike in the case of succession of States in respect of treaties, debts or property, where devolution agreements and unilateral declarations were of quite frequent occurrence in practice, similar practice does not exist as far as international responsibility is concerned. The Commission should not deal with purely hypothetical issues. We therefore understand the reluctance of the Commission to proceed with these two draft articles.

Concerning the orientation of the future work, we recognize the need to keep in mind particularities of various types of State succession, namely the transfer of a part of a territory, secession, dissolution, unification and creation of a newly independent State. In our view, however, the main structure of draft articles on the present topic does not need to faithfully follow the structure of the two Vienna conventions. We suggest that the structure of the present draft articles should rather revolve around specific elements of the State responsibility, in particular individual forms of reparation, *i.e.* restitution, compensation and satisfaction. The focus should be on the question how would the provisions on restitution, compensation and satisfaction translate into the context of State succession. In other words, how would they operate in relation to a successor State or successor States, as the case may be? How would they operate if the predecessor State continues to exist, but means for the restitution are available only to the successor State or would require joint action of the predecessor State and the successor State, or joint action of two or several successor States? The Commission should also examine whether, or in which circumstances, there is a role for compensation between successor States or between the predecessor and the successor State or States, in situations when one of them would honor in full the secondary obligation (e.g.

restitution) towards the injured State. Similar range of questions arises in situations when the predecessor State was a victim of an internationally wrongful act of another State.

Such approach would also respond to the call of those members of the Commission who, while recognizing the need for the Commission to duly consider the work of other bodies on the topic, such as Institut de droit international and the International Law Association, underlined that the Commission should proceed independently in its examination of the topic. Focusing on the topic from the perspective of State responsibility would provide opportunity for such a new approach.

Mr. Chairman,

Finally, concerning the topic “**Protection of the environment in relation to armed conflicts**”, we congratulate Ms. Marja Lehto on her appointment as Special Rapporteur and wish her every success in her future efforts. We took note of the fact that, prior to the appointment of the Special Rapporteur, the Working Group was established to consider the way forward with this topic. This is indeed the main issue of our concern.

We note that the Commission did not inscribe this topic on its program with the view to its progressive development and codification in terms of article 15 of its Statute, and that the Commission at no stage of its work indicated its intention to work on a draft legally binding instrument. Indeed, in our view, should there be a need for the amendment of existing instruments, such task would have to be undertaken, in appropriate instances, by the State Parties to these instruments, not by the Commission.

Assuming that the Commission intends to continue working on a set of principles or rules which are already contained in existing legal instruments dealing with protection of the environment and applicable in armed conflicts, it should explain what is the value of such exercise, and in particular how a mere compilation of various provisions of existing legal instruments could “enhance” such protection, as purported in draft principle 2. The risks arising from of a selective or incomplete compilation should also be duly considered.

The appointment of a new Special Rapporteur provides an opportunity to have a fresh look also at these issues.

Thank you, Mr. Chairman.