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Report of the International Law Commission
Subsequent agreement and subsequent practice in relation
to the interpretation of treaties
Identification of customary international law
Other decisions and conclusions of the Commission

Statement by

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Mr. Chairman,

Since this is the first time I take the floor under this agenda item, I would like to assure you of our full support and cooperation.

The Czech Republic will now address topics included in this year's report of the International Law Commission and covered by **Cluster I** of the work programme of the Sixth Committee. ~~I will read only the key parts of the statement, while the whole text of the statement will be~~ available in writing.

Mr. Chairman,

The Czech delegation welcomes the completion of the second reading by the Commission of the draft conclusions on the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**". We commend the Special Rapporteur, Professor Georg Nolte, for his leadership and major contribution to this result. The Special Rapporteur's reports contain an extensive and comprehensive analysis of relevant state practice, jurisprudence and doctrine. The outcome of Commission's work on this topic will provide further useful background to States in their application of relevant provisions of the 1969 Vienna Convention concerning the interpretation of treaties.

In its work on the topic under consideration, the Commission focused on subsequent agreements and subsequent practice as a particular aspect of the interpretation of treaties in the light of treaty practice, which developed after the entry into force of the Vienna Convention on the Law of Treaties. In our view, it is important to recall that Commission's conclusions resulting from this exercise *do not* affect either validity of the relevant provisions of articles 31 and 32 of the Vienna Convention, or their understanding as explained in the commentaries of the Commission which served as a basis for the adoption of articles 31 and 32 by the diplomatic conference.

As we stressed at other occasions, the role of subsequent agreements and subsequent practice in the interpretation of treaties can only be properly understood in the context of the entire set of rules of treaties' interpretation contained in articles 31 and 32 of the Vienna Convention. We note that in paragraph 5 of its conclusion 2 the Commission recalls that "the interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32". We also note that this aspect of treaties' interpretation was in the same way captured already in Commission's commentary to the 1966 draft articles on the law of treaties.

We note that there has never been a dispute about the understanding of the process of interpretation as "a single combined operation", neither in practice nor in theory. It seems to us that the main reason for elevating this element of the 1966 commentary to the pedestal of a "conclusion" was the risk of possible misunderstanding, resulting from structuring of draft conclusion 2. In other words, a risk created by the Commission itself, as implicitly admitted in paragraph 11 of the commentary to draft conclusion 2.

In all stages of Commission's work on the topic, the Czech Republic availed itself of an opportunity to comment on various aspects of draft conclusions. It did so extensively, in particular in its written comments on the draft conclusions resulting from the first reading. We therefore do not consider it necessary to comment on individual conclusions at this occasion.

Nevertheless, we have one remark concerning the selection of Commission's topics in general: the experience from the work on this and some other topics on current program of Commission's work, such as the protection of the environment during armed conflicts, should, in our view, prompt a deeper reflection, both in the Commission and in the Sixth Committee, on the advantages and disadvantages of topics not intended for further progressive development and codification of international law. We notice growing tendency towards selective elevation of some aspects of otherwise complex and closely interrelated matters, covered by already existing legal instruments, primarily for purpose of their theoretical analysis. In some cases, instead of contributing to further consolidation of existing international rules, giving predominance selectively to some aspects of existing legal regimes over other aspects may create a risk of gradual fragmentation of these regimes.

Mr. Chairman,

The Czech Republic welcomes the completion of the second reading by the Commission of the topic „**Identification of customary international law**“. We thank and congratulate the Special Rapporteur, Sir Michael Wood, and the Commission for their work on this topic. The outcome of Commission's work on this topic will provide a useful guide for practitioners, in particular judges, who have to deal with issues concerning the determination of rules of customary international law in national proceedings.

Since we commented on draft conclusions in previous stages of Commission's work on the topic, at this occasion we will limit our intervention to general remarks. The draft conclusions are succinctly formulated and well organized and structured. We appreciate that, throughout the draft conclusions, the Special Rapporteur and the Commission put emphasis on the methodological issues concerning the process of determination of both elements of norms of customary international law, general practice and *opinio iuris*. The elaboration of these aspects is important in view of a quite spread tendency to allege the existence of a particular rule of customary international law without proper verification of the existence of both of the constitutive elements of customary international law.

As regards the concrete conclusions, we very much appreciate the detailed response, prepared by the Special Rapporteur, to comments by States to the draft conclusions adopted on first reading in 2016. The comments expressed by States, both in their written contributions and oral statements, and the debates in the Commission and its Drafting Committee indicate that large parts of draft conclusions reflect the consensus of States.

On the other hand, some issues covered by the draft conclusions, such as the relevance of practice of international organizations, the relevance of inaction as a form of practice, or the role of specially affected states, are still subject of differing opinions. In this regard, we consider that the draft conclusions should be understood as representing the outcome of the Commission's own analysis and consideration. We are also of the opinion that the issue

of the so called „non-localized“ particular customary law, involving States that do not have some regional relationship, is rather theoretical and debatable concept, which requires further analysis. Further, we would like to reiterate our reservation, already expressed in our written comments, to draft conclusion 10 paragraph 3 concerning the failure to react as evidence of *opinio iuris*. In our opinion, this draft conclusion *does not* adequately reflect the practice of States, namely different types of the „failure to react“ by individual States and different significance it may have for the existence or creation of a customary law norm.

Mr. Chairman,

Now I would like to briefly comment on the decisions of the Commission contained in **Chapter XIII** of its report. Firstly, the Czech Republic welcomes the decision to include the topic „**General principles of law**“ in the Commission’s programme of work and congratulates Mr. Marcelo Vázquez-Bermúdez for his appointment as Special Rapporteur for this topic. As mentioned in the last year’s syllabus on this topic, this source of international law has been used for more than a century, but its nature, scope and methods of identification remain unclear. Therefore, we expect that the Commission will provide states with practical and concrete conclusions and commentaries based on analysis of State practice, jurisprudence and views of scholars concerning this topic.

As regards other potential topics for consideration by the Commission, the Czech Republic supports the recommendation by the Commission to include the topic „**Universal criminal jurisdiction**“ in the long-term programme of work. In previous years, we have been proposing in the Sixth Committee to refer this topic to the Commission, since it deserves a thorough legal analysis and the International Law Commission is the most suitable place for such task. In addition, the topic is related to other former or current topics on the agenda of the Commission.

On the other hand, we would like to express doubts concerning the inclusion of the topic „**Sea-level rise in relation to international law**“ in the long-term programme of work of the Commission. The Czech Republic is fully aware of the global dangers of climate change, including the sea-level rise and its consequences for low-lying coastal States and small island States and their populations. We are of the opinion, however, that the topic has predominantly scientific, technical and political character. It should be considered by relevant technical and scientific bodies and by an inter-governmental forum having a mandate to deal with the law of the sea, in order to preserve the integrity of the law of the sea regime.

Thank you, Mr. Chairman.