

## B. Formation and evidence of customary international law

Express reference to the question of formation of customary international law and the types of evidence suitable for establishing such law in a given situation in the practice of the Czech judicial bodies or in the statements of State agents is rather limited (I.). Nevertheless, references to international customary law in national legislation (II.) and decisions of national courts (III.) might be relevant for further consideration of this topic by the Commission.

I. The Constitutional Court of the Czech Republic confirmed the doctrinal stand that two essential elements are constitutive of an international customary norm, namely the general, consistent and repetitive practice of States (*usus longaevus*) and the legal belief that such practice is legally binding within the international community (*opinio necessitatis sive iuris*) (judgment file no. II. ÚS 214/98 dated 30 January 2001). As such, the Court affirmed that regime of succession of States is regulated by international customary law, nevertheless, the doctrine of “acquired rights” has not attained a customary normativity. In consequence, there exists no norm of general international law prescribing the Czech Republic to assume the legal obligations of another State, including the predecessor, towards individual that had not been in any manner effectively linked with the newly emerging State or its territory and whose rights were founded upon regulations of administrative (public) character.

Similarly, in a decision related to privileges and immunities under international customary law (file no. 11 Tcu 167/2004 dated 16 December 2004), the Supreme Court of the Czech Republic regarded international custom as a long-standing pattern of behaviour, followed in practice by subjects of international law in their mutual relations whilst convinced of the legal obligation to follow such behaviour. In spite of the fact that the Court did not recognize international customary norms to be applicable in this particular case, it confirmed the categories of individuals entitled to such protection under customary international law.

II. Several national laws and bilateral treaties concluded by the Czech Republic refer to international customary law in general or with respect to particular legal regime. The Constitution of the Czech Republic stipulates in Art.1 (2) that „[t]he Czech Republic shall observe its obligations resulting from international law” which encompasses international customary rules.

E.g., the Act on the prospection, exploration and extraction of mineral resources from the Seabed beyond the limit of State jurisdiction and amending some other acts (Act No. 158/2000 of the Official Gazette) sets for objective to „implement the principles and rules of international law“ that qualify the Area and its resources as common heritage of mankind. The Act stipulates that activities in the Area that are not regulated by the legal regime it establishes or by a treaty will be object of the application of „principles and rules of general international law“. The Act on maritime navigation (Act No. 61/2000 of the Official Gazette)

contains a similar general reference to „generally recognized rules of international law“ that together with treaties have normative priority over its provisions.

Furthermore, bilateral economic treaties concluded by the Czech Republic and States of the former Soviet Union (Uzbekistan, Azerbaijan, Ukraine, Kazakhstan, Belarus, Russian Federation) on economic, industrial, scientific and technical cooperation refer regularly to „generally recognized international norms and rules“, „principles of international law“ etc. Such references have not been subject of discussion during the negotiation process in terms of justification of particular international custom and have been understood by the Parties as a usual formal part of such treaties and comity.

III. Several decisions of national courts contain a general reference to international customary law or recognize explicitly particular rules as an expression of international custom.

E.g., the Constitutional Court of the Czech Republic recognized freedom from torture and other inhuman or degrading treatment or punishment and the principle of non-refoulement as non-derogable rights that are guaranteed both by treaties and peremptory norms of general international law. Such conventional rules and international customs establish an objective responsibility regime (resolution file no. II. ÚS 543/03 dated 21 December 2004).

In addition, the Ministry of Interior confirmed that the Czech Republic also applies the customary rule of readmission of its own nationals since the readmission regime does not always follow the conventional framework but can be applied upon a customary basis.

The Constitutional Court referred in general to international custom in the judgment on the Treaty of Lisbon (file no. Pl. ÚS 19/08 dated 28 November 2008). This judgment contains also reference to the statement of the President of the Czech Republic as party to proceedings on the conformity of a treaty with the constitutional order in this judicial proceeding. The President highlights the consensual basis of international law, including international custom where the consent is given implicitly.