

## Comments of the Czech Republic on the specific issues raised in Chapter III of the Report of the International Law Commission on the work of its 65th session

### A. Immunity of State officials from foreign criminal jurisdiction

No practice of the Czech institutions or decisions of the Czech courts, which would refer directly to the meaning given to the phrases „official acts“ and „acts performed in an official capacity“ in the context of the immunity of State officials from foreign criminal jurisdiction, were identified. However, some information on the Czech legislation and judicial decisions might be relevant for further consideration of this topic by the Commission.

With reference to the current discussions of the International Law Commission on this topic and to the relevant sources cited by the Commission, the phrases „official acts“ and „acts performed in an official capacity“ can be understood as notions being relevant for the application of immunity of State officials *ratione materiae*. This immunity is based on the principle, according to which State officials are immune from the jurisdiction of a foreign State with regard to „official acts“ or „acts performed in an official capacity“, since these acts are attributable to the State they represent (in the context of immunity from civil jurisdiction, this principle is reflected in Article 2, paragraph 1 (b) (iv) of the United Nations Convention on Jurisdictional Immunities of States and Their Property and the relevant commentary of the International Law Commission, according to which „the actions against representatives of the State or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent“). This conclusion is consistent with the opinion, expressed i.a. by the House of Lords in *Jones v. Saudi Arabia* (2006), that „... the circumstances in which a State will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law“, which seems to suggest that, for this purpose, the scope of the terms „official acts“ and „acts performed in an official capacity“ should reflect the content of the relevant provisions of Chapter II of the Articles on Responsibility of States for Internationally Wrongful Acts, describing the attribution of conduct to a State.

On the other hand, the Czech Republic is aware of the fact that, in the context of criminal jurisdiction, exceptions to the immunity *ratione materiae* of State officials have been applied or considered, both in the decisions of international and national courts and in the writings of legal scholars: one being a norm of customary international law providing for an exception to immunity *ratione materiae* in a case where an official has committed a crime under international law (international crime), which is attributed not only to the State but also to the official who performed it; the other being an exception explicitly or implicitly contained in relevant treaties, such as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment or the International Convention for the Protection of All Persons from Enforced Disappearance, which set aside the immunity *ratione materiae* otherwise covering the acts performed by State officials in an official capacity (i.e. when a treaty provides for an extra-territorial criminal jurisdiction and expressly contemplates prosecution of crimes committed in an official capacity, immunity *ratione materiae* cannot logically co-exist with such a conferment of jurisdiction).

With regard to the above introductory remarks, we would like to provide information on the content and interpretation of the provisions of the Czech criminal law, which might be relevant for the consideration of the present topic by the Commission:

Section 127 of the Criminal Code of the Czech Republic (Act No. 40/2009 of the Official Gazette) contains a definition of a public official for the purpose of the Criminal Code. Pursuant to paragraph 1 of Section 127, a public official, to be regarded as such for the purposes of the Criminal Code, has to „fulfil the duties of a State or society and thereat use the assigned authority“. Paragraph 2 of Section 127 further provides that, for the purpose of criminal responsibility of public officials as well as their protection according to relevant provisions of the Criminal Code, it is required that the criminal offence is committed „in relation to the authority or responsibility of the official“. In addition to the general definition, paragraph 3 of Section 127 provides that „a public official of a foreign State or international organisation shall be considered, under the conditions referred to in sub-section (1) and (2), a public official according to the Criminal Code, if an international agreement provides so.“.

According to the commentary to the Criminal Code, the purpose of the inclusion of public officials of foreign States (and international organisations) into this provision is the fact that, within the framework of international cooperation in criminal matters, States have recently adopted certain forms of cooperation, whereby the officials of one State perform their official functions on the territory of another State. Even if the powers of these foreign officials are limited, the relevant international agreements contain provisions according to which these officials have the same status - as far as their criminal responsibility is concerned - as the officials of the State on whose territory they perform their functions. Examples of these agreements and provisions are Article 21 of the (Council of Europe) Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 8 November 2001 („During the operations referred to in Articles 17, 18, 19 or 20, unless otherwise agreed upon by the Parties concerned, officials from a Party other than the Party of operation shall be regarded as officials of the Party of operation with respect to offences committed against them or by them.“) or the (European Union) Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 („During the operations referred to in Articles 12, 13 and 14, officials from a Member State other than the Member State of operation shall be regarded as officials of the Member State of operation with respect of offences committed against them or by them.“).

The Czech courts interpreted some of the above phrases of the Criminal Code - however only within the context of proceedings with respect to the Czech officials - as follows: The phrase „the duties of a state or society“ encompasses the material preparation of a decision, the decision itself and the enforcement of the decision. However, the activities of persons who perform only auxilliary manual works or less important technical-administrative functions, such as secretaries, technicians, typists or press officers, cannot be subsumed within the phrase „the duties of a state or society“; therefore, these persons cannot be assigned the authority for the fulfilment of these duties. The notion „authority“ consists in the entitlement of the State organ to exercise public power, i.e. the power which authoritatively, whether directly or indirectly, determines (decides) the rights and obligations of other persons. The person whose rights and obligations are the subject of such a determination is not in an equal position with the relevant State organ and the content of such a determination (decision) is not dependent on the will of such a person. Even if the exercise of the authority may have broader meaning than the determination of (decision on) the rights and duties of natural or legal persons, the notion of „authority“ always contains an element of power and an element of decision-making.

The above provisions of the Czech Criminal Code and their interpretation might be relevant for the meaning given to the phrases „official acts“ and „acts performed in an official capacity“ in the context of the immunity of State officials from foreign criminal jurisdiction; the above mentioned international agreements might be relevant for consideration of treaty-based exceptions to the immunity *ratione materiae* of State officials from foreign criminal jurisdiction.