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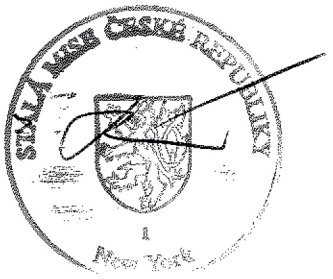
The Permanent Mission of the Czech Republic to the United Nations in New York presents its compliments to the Secretary–General of the United Nations and has the honor to present the *Comments of the Czech Republic on the specific issues raised in Chapter III of the Report of the International Law Commission on the work of its 65th Session.*

The Permanent Mission of the Czech Republic to the United Nations in New York avails itself of this opportunity to renew to the Secretary–General of the United Nations the assurances of its highest consideration.

New York, January 31, 2014



His Excellency
Mr. Ban Ki-moon
Secretary-General
United Nations
New York

Copy to the attention of:
Secretary of the International Law Commission
United Nations
New York

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 commetary 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 explicity 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 maters, 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 „oficial 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 imunity *ratione materiae* of State officials from foreign criminal jurisdiction.

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 refered 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.

C. Provisional application of treaties

The Czech Republic applies provisionally the international agreements but this practice is limited by the Constitution of the Czech Republic. While the executive treaties (the international agreements concluded within the competence of the Government and respective Ministries, i.e. within the framework of the Czech laws) can by provisionally applied fully, the treaties that are subject of the approval of the Parliament before their ratification can be provisionally applied only to the extent they are compatible with the Czech laws.

Furthermore the provisional application is quite common for the treaties negotiated in the framework of the European Union (EU). The legal basis for the provisional application of international agreements concluded between the EU and third countries (or international organisations) is enshrined in Article 218(5) of the Treaty on the Functioning of the European Union.

In practice, the EU regularly makes use of the provisional application especially in the case of the so-called mixed agreements which require ratification by all Member States and thus can be very time-consuming. As the provisional application of provisions falling within the Member States' competences may prove impossible due to constitutional restrictions in Member States' legal systems, only those matters covered by the agreements coming within the EU's competence are provisionally applied by the Union or the scope of the provisional application by the Member States is limited by the requirement of conformity with internal procedures (or domestic legislation).

Thus, the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, is being applied on a provisional basis by the Union, pending the completion of the procedures for its conclusion, and at the same time provisions falling within the Member States' competences are excluded from the provisional application [see Art. 3 of the Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (2011/265/EU)].[1]

As another example, Art. 3 of the Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 15 October 2010 on the signature and provisional application of the Common Aviation Area Agreement (''CAAA'') between the European Union and its Member States, of the one part, and Georgia, of the other part (2012/708/EU) and Art. 29 of the CAAA itself[2] establish that pending its entry into force, the CAAA shall be applied on a provisional basis by the Union and by the Member States, in accordance with their internal procedures and/or domestic legislation as applicable.

D. Protection of the environment in relation to armed conflicts

No relevant examples of the Czech national practice concerning this topic were identified.

[1] Official Journal of the EU, L 127, 14. 5. 2011, p. 1–3.
[2] Official Journal of the EU, L 321, 20. 11. 2012, p. 1–32.