International Law Commission's draft conclusions on identification of customary international law - Czech Republic's comments

With reference to paragraph 60 of the Report on the work of the sixty-eighth session of the International Law Commission (doc. A/71/10), the Czech Republic welcomes the opportunity to present written comments on the set of draft conclusions, together with commentaries thereto, on identification of customary international law, adopted on first reading by the International Law Commission. In this connection, the Czech Republic would like to express its gratitude and appreciation to the Commission and the Special Rapporteur, Sir Michael Wood, for their work on this topic.

The Czech Republic would like to make the following comments concerning selected aspects of the draft conclusions:

I. Failure to react as evidence of *opinio iuris* - draft conclusion 10, paragraph 3

The draft conclusion 10, paragraph 3 provides that „failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction". The commentary to this draft conclusion adds that two requirements have to be satisfied in such a case: first, „it is essential that a reaction to the practice in question would have been called for" and „the State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), and that it must have had sufficient time and ability to act".

Comments:

The Czech Republic is of the opinion that this draft conclusion (together with the commentary thereto) does not adequately reflect different types of the inaction or the „failure to react" by individual States and different significance it may have for the existence or creation of a customary law norm.

There could be various reasons why States do not react to practice of other States, even if they could be generally presumed to do so. States may fail or refuse to react simply due to diplomatic and political considerations or because of lack of capacity or lack of direct interest in the relevant concrete conduct of other State (States). Thus, the reasons why States do not react in a specific case may have nothing to do with the legal assessment of the practice and their (non-)reaction to such practice.

Therefore, the Czech Republic suggests that more attention is paid, *inter alia*, to the differentiation between, on the one hand, failure to react by States which are particularly (specially, directly) interested, concerned and affected by relevant practice of other States and are aware of the legal significance of their reaction or failure to react, and, on the other hand, inaction or failure to react by other States, which may be based on political, practical or other non-legal considerations and which does not stem from the sense of customary legal obligation.

In addition, we are of the opinion that the Commission should also analyse the differences between the failure to react to relevant practice in cases when a new rule of customary international law might be potentially created in areas which have not yet been regulated by any rule of customary international law on the one hand, and, on the other hand, in cases when a potential new rule would deviate from an already established customary rule. The fact that certain customary rule already exists serves as a stabilizing factor and, in general, reduces the need to react to practice of other States which deviates from such a rule (the principle being that a deviation from already established rule is regarded as the breach of that rule and not as the beginning of creation of a new rule).

Having regard to the comments above, the Czech Republic proposes that the draft conclusion 10, paragraph 3 is deleted or substantially reformulated.

II. „Non-localized" particular customary international law – draft conclusion 16, paragraph 1

According to conclusion 16, paragraph 1 of the draft conclusions, „a rule of particular customary international law, whether regional, local or other, is a rule of customary

international law that applies only among a limited number of States". In its commentary (para. 5), the Commission adds that „although particular customary international law is mostly regional, sub-regional or local, there is no reason in principle why a rule of particular customary international law should not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest, whether established by treaty or otherwise".

Comments:

The Czech Republic would like to express reservations concerning this draft conclusion, namely the analysis of „non-localized" particular customary international law.

The Czech Republic would like to point to the fact that the existence of particular customary international law, being in the nature of an exception, is a matter of strict proof, *i.e.* the standard of proof required is higher than in cases where an ordinary or general custom is alleged. In addition, as also noted in the Commission's discussions on the subject, the principal case law to date in this area has been driven by geographical nexus (the existence of „non-localized custom being a theoretical concept).

In this regard, we note that neither the Commission in its commentary, nor the Special Rapporteur in its report suggesting this conclusion, have adduced any practical example of such alleged „non-localized" particular custom. In addition, it is not clear how such a vague criterion as „common cause, interest or activity" (or „community of interest") could be clearly identified in practice and could form a solid basis for existence of a rule of particular customary international law deviating from the rules of general customary international law.

Therefore, we propose that the Commission substantially expand and elaborate its analysis concerning the alleged existence of „non-localized" customary international law, using relevant concrete examples, if any, from State practice. Alternatively, we propose that the „non-localized" customary international law is not addressed in the draft conclusions.