IV.

CZECH PRACTICE OF INTERNATIONAL LAW

CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

Statements of the Czech delegation made at the Sixth Commitee duting the 64th sesssion of the General Assembly of the United Nations in October 2009 (Agenda Item 81)

Introductory note

It is a well-known fact that, according to Article 13, para. 1, of the Charter of the United Nations, "the General Assembly stall initiate studies and make recommendations for the purpose of: a. … encouraging the progressive development of international law and its codification." On 21 November 1947, the General Assembly adopted resolution 174 (II), establishing the International Law Commission ad approving its Statute. Article 1, para. 1, of the Statute of the ILC provides that the "Commission stall have for its object the promotion of the progressive development of international law and its codification". Therefore the ILC has become the most important UN body for the codification and the progressive development of international law. The Commission submits every year to the General Assembly a report on the work done at each of its sessions. The well-established practice of annually considering the reports of the ILC in the Sixth Committee of the UN GA has facilitated the development of the existing relationship between the General Assembly and the Commission. Member States have an opportunity to comment on the report of the ILC and thus to influence drafts articles and other texts prepared by the ILC on various subjects that are on its agenda.

The Czech Republic takes actively part in the debate at the Sixth Committee. The Department of International Law of the Ministry of Foreign Affairs of the Czech Republic, in a close cooperation with legal experts working in the academia, in particular at the Faculty of Law of Charles University in Prague, prepares annually both an analysis of the Report of the ILC and statements on selected topics presented on behalf of the Czech Republic. In October 2009, the Czech delegation made the in-depth comments on the draft articles on Responsibility of international organizations adopted on first reading and shorter statements on four other topics.

(ed. Pavel Šturma)

Content

Statement by Mr. Jaroslav Horák, Director-General of the Legal Section Ministry of Foreign Affairs of the Czech Republic

Report of the International Law Commission on the work of its sixty-first session (Responsibility of International Organizations), New York, October 26, 2009

Mr. Chairman,

In this part of the debate on the Report of the International Law Commission, the delegation of the Czech Republic would like to comment on the topic "Responsibility of international organizations".

The Czech delegation welcomes that at this year's session the Commission completed the first reading of all 66 draft articles on responsibility of international organizations, and regards the adoption of these draft articles as a major success of the current quinquennium of the Commission. The Czech Republic would like to express its appreciation and thanks to the Commission as a whole, and namely to the Special Rapporteur, Mr. Giorgio Gaja, for the work done on this topic over the past years.

The Czech Republic's comments will focus on the specific issues raised in Chapter III of the Commission's Report regarding certain aspects of responsibility in relations between States and international organizations.

The first question is: When is conduct of an organ of an international organization placed at the disposal of a State attributable to the latter?

In our opinion, the responsibility of an international organization and the responsibility of a State are not mutually exclusive. In other words, under certain conditions, a conduct that is regarded as the conduct of an international organization may also be attributed to a State.

Nevertheless, the picture presented by the existing case-law is ambiguous, to say the least. The rulings of the European Court of Human Rights in Behrami and Saramati cases interpreted the criterion of "effective control" in a way leading to the conclusion that the conduct was attributable to the United Nations. By contrast, the House of Lords of the UK, concluded in Al Jedda case that the conduct in question was attributable to a State rather than an international organization. In Bosphorus case, the European Court of Human Rights looked at the problem from a different perspective and based its ruling on the doctrine of equivalent protection.

Unfortunately, other cases that might have provided us with important guidance on the issue were dismissed already in the preliminary stage and did not lead to rulings on merits. These were the Banković case at the European Court of Human Rights and the case of legality of use of force at the International Court of Justice.

Like case law, other examples of practice of States and organizations present a mixed picture. In some cases, the State acknowledged its responsibility and paid compensation even though the act was committed in the context of an operation under the auspices or coordination of an international organization. To remove this ambiguity, we urgently need clear-cut rules.

In our opinion, the solution is to respect the separate legal personalities of the international organization and its member State, on the understanding that in certain cases it may be necessary to pierce the corporate veil of the international organization. However, the member State implementing an act of an international organization would incur responsibility only in the following cases:

(i) In implementing an act of an international organization, the State has exceeded the scope of conduct attributable to the international organization; or

(ii) The State was involved in the implementation of an act of an international organization which manifestly exceeded the authority of the organization, that is, a manifest ultra vires act; or

(iii) The State was directly involved in the implementation of an act of an international organization which constituted a serious breach of a jus cogens obligation.

The first case reflects, mutatis mutandis, the rule formulated in the Bosphorus judgment. A State cannot hide behind the responsibility of an international organization if, in the process of implementing an act of the organization, it exceeded the scope of conduct attributable to the international organization.

In the second case, the conduct is only seemingly that of an international organization, because it constitutes a manifest excess of the organization's authority. Here, the conduct constituting the ultra vires act is different from the conduct described in draft Article 7. What happens here is an overall deviation from the framework of the (functional) legal personality of the international organization. However, to attribute such conduct to the State (no matter whether or not the international organization itself incurs any degree of responsibility), it is necessary to prove that the organization's authority has been manifestly violated. In other words, the standard applied here, that is manifest violation, is the same as in the case of invalidity of treaties in terms of Article 46 of the Vienna Convention of 1986.

Finally, in the third case, the situation seems even more complicated. Judging from the draft articles adopted by the Commission in the first reading, an international organization may incur responsibility for a serious breach of a jus cogens obligation. However, this does not preclude the responsibility of a State in cases where the State took direct and active steps to implement the wrongful act. The conduct, by itself,

would have to meet the objective as well as subjective elements of an internationally wrongful act committed by a State.

What we have in mind here is certainly not a sweeping attribution of responsibility to all member States of an international organization. Under certain circumstances, these States may incur responsibility according to different rules, for example for a breach of secondary obligations in terms of Article 41 or for aiding and assisting an international organization in the commission of an internationally wrongful act in terms of Article 57.

The second question of the Commission is: When is consent given by an international organization to the commission of a given act by a State a circumstance precluding wrongfulness of that State's conduct?

In our opinion, the question of consent of an international organization would not be relevant in cases where the act of the State is by itself lawful. It is relevant only in cases where the organization might give the State its consent to perform an act that the State, by itself, would

have no authority to perform under international law. At the same time, it is necessary to respect the general principle nemo plus juris in alium trensferred potest quam ipse habet.

A valid consent given by an international organization to the performance of a certain act by the State precludes the wrongfulness of the act performed by the State, provided that

(i) The consent given by the international organization is within the limits of the organization's authority; and

(ii) The State acted strictly within the limits of the consent; and

(iii) The act does not conflict with a jus cogens norm that allows no exceptions, even for the international organization.

The third question is: When is an international organization entitled to invoke the responsibility of a State?

Here, in the light of the judgment of the International Court of Justice concerning reparation for injuries suffered in the service of the United Nations, it can be noted that an international organization is indeed entitled to bring a claim against the responsible State. As regards the general conditions for such entitlement, the rules of draft Article 42 might be applied mutatis mutandis.

However, it is necessary to take into account that each international organization has its special competence ratione materiae and ratione personae. Therefore, the invocation of the responsibility of the member States themselves seems an easier option. Here, the special rules of the international organization may also come into play. However, what seems to be a problem is the situation of an international organization invoking the responsibility of a State in the case of a breach of an erga omnes obligation. It seems that the application of draft Article 48, mutatis mutandis,

would be hardly acceptable in the case of a regional organization invoking the responsibility of States other than its own member States. A similar problem, only with competence ratione materiae, arises in the case of specialized organizations.

A wholly separate problem are the provisions of draft Article 63 (lex specialis). Special rules exist throughout international law. It is not a problem to supplement the general rules, especially as regards the actual ways of fulfilling the responsibility, with special rules, including the rules of the organization. One can well imagine, for example, a strict liability of international organizations in certain areas, such as space law under the Convention of 1972. Such rules might also regulate responsibility in relations between an organization and its member States. However, in no case can they relieve the international organization from responsibility. The existence of double standards for different international organizations would be undesirable as well.

As regards the questions of form, our position is that the questions of responsibility in relations between States and international organizations are so complex that one cannot simply rely on analogy to articles on the responsibility of States for internationally wrongful acts. That is why the Commission should address these questions explicitly. In such case, the draft articles seem to be the best solution, on the understanding that the final form would be determined only after the draft is finalized. The form should be the same as that of the draft articles on the State responsibility and the Responsibility of international organizations.

Thank you, Mr. Chairman.

Statement by Mr. Milan Dufek, Deputy Director, Department of International Law Ministry of Foreign Affairs of the Czech Republic

Report of the International Law Commission on the work of its sixty-first session (I. Reservations to Treaties, II. Expulsion of Aliens), New York, October 29, 2009

I. Reservations to Treaties

Mr. Chairman,

In this part of the debate on the Report of the International Law Commission, the delegation of the Czech Republic would like to comment on the topic "Reservations to treaties" and "Expulsion of aliens".

First of all, the delegation of the Czech Republic wishes to express its appreciation to the Commission and especially to the Special Rapporteur, Mr. Alain Pellet, for the results achieved over many years of work on a topic "Reservations to treaties", topic so demanding in terms of theoretical knowledge and so significant in terms of practical implications. The Czech Republic believes that the Commission will complete its first reading of the guide to practice in the nearest years, so that the guide can be reviewed as a whole and introduced into practice to provide States and international organizations with guidance in this area of international law.

The Czech delegation would like to make several remarks on one of the major points of dispute that arose at this year's session of the Commission – the issue of permissibility of reactions to reservations, that is objections to reservations and acceptances of reservations. The Czech delegation favours the view stated in the Special Rapporteur's report and echoed in the debate, which is that the real question is less whether an act is permissible or not, than whether it could produce the desired legal effects. That is why the Czech delegation believes that the Commission should focus on the effects of reactions to reservations, and that is also why it has certain doubts regarding draft guidelines 3.4.1 and 3.4.2 concerning the permissibility of reactions to reservations to international treaties.

As regards draft guideline 3.4.1 concerning the permissibility of explicit acceptance of an impermissible reservation, it does not seem quite clear why there should be two separate regimes, one for the permissibility of an explicit acceptance, and the other for a tacit acceptance. The Vienna Conventions do not make such distinction between explicit and tacit acceptance. The Czech delegation shares the Special Rapporteur's view that if any acceptance, whether explicit or tacit, is subject to the permissibility condition, it follows that a tacit acceptance in terms of Article 20, paragraph 5 of the Vienna Conventions is not permissible, which seems to be a very questionable conclusion. One of the possible ways to clear up this doubtful point might be the one indicated by the Special Rapporteur's conclusion that it would be unwise to speak of the permissibility of reactions to reservations, regardless of whether the reservation is permissible or not. Another way to clarify this might be the one mentioned in the Special Rapporteur's report, according to which Article 20 and 21 of the Vienna Conventions concerning the acceptances of reservations and objections to reservations are applicable only to permissible reservations, that is, only to reservations that pass the preliminary objective test of permissibility under Article 19 of the Vienna Conventions.

The Czech delegation has similar doubts with respect to draft guideline 3.4.2 concerning the permissibility of objections with "intermediate-effect" or "extensive" objections, that is, objections purporting to produce effects that exceed the scope foreseen in Article 21, paragraph 3 of the Vienna Conventions, but do not reach the effects foreseen in Article 20, paragraph 4 (b) of the Vienna Conventions. As suggested in the Special Rapporteur's report, in practice the use of these objections is scarce and limited to highly specific context, and there is no explicit legal basis for it in the Vienna Conventions. Therefore, the question is whether there actually is any justification for creating special rules for the permissibility of this type of objections. Moreover, draft guideline 3.4.2 makes a distinction between objections with "intermediate-effect" that meet the requirements of this guideline and thus are permissible, and objections with "intermediate-effect" that do not meet the requirements and thus are impermissible. In the Czech delegation's opinion there is a certain lack of clarity about the practical consequences of this differentiation between

permissible and impermissible objections with "intermediate effect" and whether this differentiation should also imply that these objections may have different legal effects.

As I have already mentioned, the Czech delegation believes that the central issue are the effects of objections to reservations, and is not convinced of the necessity of adopting guidelines concerning the permissibility of objections to reservations, namely the permissibility of objections with "intermediate effect". The Czech delegation is of the view that the criterion significant for the assessment of these "extended objections" is the interpretation of Article 21, paragraph 3 of the Vienna Conventions concerning the legal effects of objections with minimum effect, in particular the meaning of the phrase "the provisions to which the reservation relates". In this respect, the Czech Republic would like to draw attention to the view suggesting that objections with "intermediate effect", or their legal effects, are similar to reservations with a limited scope ratione personae, to the extent that these objections exceed the scope of the original reservation to which they respond, that is, the scope of Article 21, paragraph 3 of the Vienna Conventions.

Further, in view of the possible legal effects of objections foreseen in the Vienna Conventions, the Czech delegation also regards as reasonable the position reached by the Commission, according to which an objection with "intermediate-effect" or any other objection to a reservation cannot render the treaty incompatible with a peremptory norm of international law. As noted in the Special Rapporteur's report, an objection can only exclude the application of one or more provisions of the treaty, or the application of the treaty as a whole, in bilateral relations between the author of the objection and the author of the reservation. However, these "deconventionalized" relations continue to be governed by general international law, including ius cogens norms, which are by their nature part of general international law.

II. Expulsion of Aliens

Mr. Chairman,

Allow me to continue by commenting on the topic "Expulsion of aliens". This year, the Special Rapporteur, Mr. Maurice Kamto, presented his Fifth Report examining human rights as a rule of international law which limits a State's right to expel aliens. The Czech Republic shares the Commission's conclusion and believes that the relationship between human rights and expulsion is an issue of great importance requiring thorough consideration. Its analysis must draw on a broader range of legal literature concerning migration and human rights, as well as on in-depth study of the case law of international bodies competent to review the observance of human rights by States in the expulsion process. In this respect, greater use might be made, for example, of the work of the Human Rights Committee which monitors the implementation of the International Covenant on Civil and Political Rights by States Parties.

The Czech Republic welcomes the revised workplan with an updated list of areas on which the Commission should focus. The Czech Republic appreciates that the due process guarantees for persons who have been or are being expelled should come up for consideration in the near future. The Czech Republic believes that at the next year's session the Commission should continue the debate in order to move ahead with its work on this important topic and to reflect the views and suggestions that may be raised in future debates in the Commission and the Sixth Committee.

Thank you, Mr. Chairman.

Statement by Mr. Milan Dufek, Deputy Director, Department of International Law Ministry of Foreign Affairs of the Czech Republic

Report of the International Law Commission on the work of its sixty-first session (I. Protection of Persons in the Event of Disasters, II. Shared Natural Resources), New York, October 30, 2009

I. Protection of Persons in the Event of Disasters

Mr. Chairman,

We welcome the progress made in the topic "Protection of Persons in the Event of Disasters" during this year's session of the Commission and highly appreciate the work of the Special Rapporteur, Mr. Eduardo Valencia-Ospina.

Concerning the 5 draft articles provisionally adopted by the Drafting Committee, we agree with the choice of the rights-based approach supported by the needs-based approach. We have only one comment to the article on the "duty to cooperate". The primary responsibility of States should be underlined. The duty to cooperate with the United Nations should be differentiated and emphasized from duties owed to other organizations. The differentiation between the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies is also needed, as the former operates mostly on the basis of international humanitarian law which seems to be excluded under draft Article 4.

We fully support that the Commission excluded the concept "responsibility to protect" from the scope of the topic according to the narrow definition of the concept in the 2009 report of the Secretary-General. We look forward to the subsequent reports of the Special Rapporteur with new draft articles on other relevant principles and access of humanitarian aid in the event of disasters.

With respect to the future form of the draft articles, we are of the view that they should - as non-binding guidelines - supplement the current documents on humanitarian assistance (e.g. the relevant UNGA resolutions or the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of the International Federation of the Red Cross and Red Crescent Societies).

Thank you, Mr. Chairman.

II. Shared Natural Resources

Mr. Chairman,

As regards the topic "Shared Natural Resources", the Czech Republic would like to express its gratitude for the work of the previous Special Rapporteur, Mr. Chusei Yamada, and wishes a successful continuation of the work in this topic to the new Special Rapporteur, Mr. Shinya Murase. The Czech Republic has responded, among a few States, to the questionnaire concerning transboundary oil and gas resources and encourages other States to provide information and comments on the matter so that the Commission could decide at its next session whether it should continue its consideration of the subject.

Similarly to other States, the Czech Republic sees no need to develop universal rules in this area, however, the Commission could elaborate elements which would be useful for States when negotiating bilateral agreements on sharing transboundary oil and gas reserves and it could also summarize State practice. This State practice could include various agreements and arrangements between the States concerned and between their national oil and gas companies. However, the Commission should avoid addressing the questions of maritime delimitation. These questions can be better dealt with according to the UN Convention on the Law of the Sea by the States concerned and/or by competent judicial bodies, including the International Court of Justice.

Thank you, Mr. Chairman.