



# REPUBLIC OF POLAND

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**Sixty-Eight Session of the General Assembly  
The Report of the International Law Commission on the work  
of its sixty-third and sixty-fifth sessions (Part 1)**

Agenda item 81

*S T A T E M E N T*

*BY*

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TO THE UNITED NATIONS***

**NEW YORK, OCTOBER 30<sup>TH</sup>, 2013**

Mr Chairman,

At the outset, let me congratulate the Chairman of the International Law Commission, Mr. Bernd H. Niehaus, on his presentation of the Report of the Commission from its sixty-fifth session.

The Commission plays a valuable role in communicating on and influencing the State practice and its work continues to contribute to the strengthening of the rule of international law in international relations.

### **Subsequent agreements and subsequent practice in relation to the interpretation of treaties**

With regard to Chapter IV of ILC Report, let me first of all congratulate Professor Nolte for his first report on the topic „Subsequent agreements and subsequent practice in relation to the interpretation of treaties”.

As treaty interpretation is ongoing task not only of courts and tribunals but also governmental officials we fully support the efforts initiated by ILC in this regard. We hope that it will result in practical and useful guidelines based on existing - well-established practice.

As regards the report of the Special Rapporteur I would like to draw the attention of the delegations to the fact that the report focuses only on decisions of international bodies. Although number of quoted decisions is remarkable, such an approach seems not sufficient because it does not take into account the decisions of national courts. In this connection it's worth reminding that ICJ in several cases conducted widespread survey relating to decisions of national courts. That has been done for example in jurisdictional immunities case (Germany versus Italy).

Poland welcomes adoption of Five Conclusions by the Commission. Specifically, we would like to reiterate our support for situating the Conclusions in the general framework of provisions of Vienna Convention regarding interpretation of treaties. We also support Conclusion One as an expression of unity of the interpretation process, which, in accordance with the Vienna Convention, avoids any categorization of treaties for this purpose.

Referring to specific issues raised in the ILC report, let me make my first remark to the interpretation of term “agreement” in article 31 (3) (a) of VCLT.

While agreeing (as a matter of form) that not every agreement is a treaty, it is however difficult to agree (as a matter of substance) that “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (...) are not necessarily binding”. The doubts as to the binding character of these agreements would question the need to concluding them at all. Taking into account all means of interpretation, in some circumstances such agreements can be treated as not conclusive for example for international tribunal, however it is difficult to consider them as not binding for states which concluded them.

And my second remark, Mr. Chairman, relates to Conclusion 4 paragraph 3. Poland proposes use of the term "conduct of one or some parties" to ensure that this provision does not relate to concordant practice embracing all the parties.

### **Immunity of State officials from foreign criminal jurisdiction**

Mr. Chairman,

With regard to the issue “Immunity of State officials from foreign criminal jurisdiction” we see it as an important topic on the agenda. It goes to the core of international law. In fact it not only combines two great phenomena of jurisdiction and immunity. It also refers to much more important rules and norms of public international law. That is why the burden for the ILC and the Special Rapporteur could hardly be overestimated.

We appreciate the efforts of the Special Rapporteur to define criminal jurisdiction. That definition, however, may happen to be in fact too narrow and too wide at the same time. There are States in which law regarding misdemeanours is applied by bodies other than courts. It was also the situation of Poland a few years ago. In case of such States the reference to courts in the definition may leave some criminal proceeding outside the scope of the immunity. There are also pecuniary sanctions not of a criminal nature which are applied by courts. Unquestionably, the issue of definition of criminal jurisdiction deserves great attention in the future works of the ILC.

As to the efforts to define the scope of immunity *ratione personae* we would rather like to see the presentation of both types of immunities first (that is both *ratione personae*

and *ratione materiae*) before we express our definitive position.

In fact they both interact with each other. That interaction does determine the legal protection of foreign officials of a given State in other States. In fact, however, we would like to point at the relationship between the immunities of foreign officials and the immunity of States. Too narrow scope of the immunity *ratione personae* may undermine the immunity of States and may make it difficult for States to cooperate.

On the other side we understand and support the view of the Special Rapporteur that not every State official is entitled to immunity *ratione personae*. At the same time we are of the opinion that limiting it only to three officials (the Head of State, the Head of Government and the minister of foreign affairs) requires further analysis. The survey of practice in search of customary law should help to arrive at a satisfactory solution of this problem, which is of fundamental importance.

We also agree with the position of the Special Rapporteur being concentrated on search for positive norms of international customary law. In fact, the norms of immunities (or even immunities as such) have developed since the times immemorial. What is of importance for officials other than the three above-mentioned is not only the lack of rulings in which an immunity was established but also rulings in which such an immunity was denied. It goes without saying that those rulings and opinions must be confronted with the contemporary developments in this area.

### **Other decisions and conclusions of the Commission**

As far as other issues are concerned my delegation would like to support shifting focus on the topic "The obligation to extradite or prosecute" (*aut dedere aut iudicare*) towards areas which are still not covered by this obligation e. g. some of the most crimes against humanity, war crimes other than grave breaches and war crimes in non-international armed conflicts.

Thank you Mr Chairman.