REPUBLIC OF POLAND

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MINISTRY OF FOREIGN AFFAIRS

OF THE REPUBLIC OF POLAND

UNITED NATIONS GENERAL ASSEMBLY

Report of the International Law Commission

on the work of its sixty-seventh session

cluster III

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Protection of the environment in relation to armed conflicts

Mr Chairman,

Poland is of the view that the topic protection of the environment in relations to armed conflict raises important international law questions, as it tries to find a compromise between two different branches of international law – international environmental law and international humanitarian law. Moreover, we agree with those members of the Commission which consider that aim of this topic is to achieve proper balance between safeguarding legitimate rights of States that exist under the law of armed conflict and protecting environment.

Polish delegation welcome interesting and informative second report of the Special Rapporteur Ms. Marie G. Jacobsson. We have noticed that the report seems to not cover practice relating to non-State armed groups, nonetheless we are of the view that such a practice could have very limited value for this topic.

As to the proposed method of work on the issue we are not persuaded why draft principles and not draft conclusions or draft articles are applied for this topic. The latter formulae has sufficient practice of use in the work of the ILC, while the former are rarely used by the Commission. For example it is difficult to consider from the theoretical perspective draft principle I related to the duty of states to designate environmental protected zones as principle. The same applies to draft principle II-5. Furthermore in our view, automatism of deprivation of the protection of the designated zone covered by this draft principle should be reconsidered.

Immunity of State officials from foreign criminal jurisdiction

Mr Chairman,

Poland recognizes the topic of immunity of state officials from foreign criminal jurisdiction as of utmost importance. That is why in June 2015 Poland transmitted to the Commission the Opinion of the Legal Advisory Committee to the Polish Minister of Foreign Affairs on immunities of State officials from foreign criminal jurisdiction. We uphold our reservations as regards the terminology used by the ILC with regard to the immunity ratione personae and immunity ratione materiae. As the Legal Advisory Committee indicated, the ILC discusses the personal scope and the material scope in relation to the immunity ratione personae (the term properly denoting solely the personal scope of the immunity) and equally ineptly the Commission discusses the personal scope and the material scope of the immunity ratione materiae (the term properly denoting the material scope of the immunity). This

terminological confusion is clearly visible in draft article 6 accepted by the Commission in its sixty-seventh session. Although the title of this draft article relates to the scope of immunity ratione materiae, paragraph 3 covers individuals who enjoyed immunity ratione personae.

We are fully aware that terminological errors are fixed in practice and it is not easy to correct them, but it seems that the problem is worth consideration.

In this context in view of the Polish delegation, although both - immunity ratione personae and ratione materiae - are closely linked to the function performed by individual, the terms personal immunity for denoting immunity ratione personae (in the meaning used by the Commission) and functional immunity for immunity ratione materiae (in the meaning used by the Commission) are better suited. Consequently, the draft provisions should elaborate on various aspects of personal and functional immunities, that is their scope ratione personae, ratione materiae, ratione temporis and ratione loci. The provisions on the temporal scope of immunity should establish the rule of permanency of the immunity from criminal jurisdiction regarding acts performed in an official capacity whether an individual enjoys personal or functional immunity. Additionally, there should be a provision concerning temporal scope of the immunities covering private acts of the individuals enjoying personal immunity.

Provisional application of treaties

Mr Chairman,

Poland considers that provisional application of treaties is an important instrument for States in determining their international law rights and duties. In particular provisional application enable acceleration of acceptance of international obligations by states and international organisations. Therefore, Poland supports the work of ILC on this topic. We are of the view that it has utmost practical importance and preparation of guidelines is the appropriate tool for achieving this aim.

With reference to three draft guidelines that were provisionally adopted by the Drafting Committee we are satisfied that they are solidly grounded on Article 25 of the Vienna Convention on the Law of Treaties. With respect to draft guidelines presented by the Special Rapporteur Mr. Juan Manuel Gómez-Robledo in his third report we would like to express our concerns on the limitations introduced to draft guideline 1. We fully agree that States and international organizations may provisionally apply a treaty, or part thereof, when the treaty itself so provides, or when they have in some other manner so agreed. But we think that from the international law perspective the internal law restrictions are irrelevant. Thus

conditioning provisional application of a treaty on the basis of its provision by reference to the rule of internal law (as in draft guideline 1) could be in contradiction with the principle contained in article 27 of the Vienna Convention of the Law of the Treaties which states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". We are satisfied that the restriction ("provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application") is absent in a new formula of draft guideline 3 proposed by the Drafting Committee. These issues should be rather elaborated in a commentary and not in a guideline itself.

Furthermore, we consider that draft guideline 4 proposed by the Special Rapporteur stating solely that provisional application of a treaty has legal effects should be substantiated.

Mr Chairman,

Poland is of the opinion that the ILC work on provisional application of treaties would have much higher practical value if the Commission identified certain types of model clauses that are used for provisional application with the commentary stating the advantages and drawbacks of particular clause. We are especially interested in an evaluation by the Commission of a "reservation" which is quite common in practice, making the scope of provisional application of a treaty dependent upon the availability of an internal law mechanisms at a given time. Moreover, it would be extremely useful to get from the commentary of the Commission the information on typical domestic regulations on provisional application of treaties covering the aspects of procedure and implementation. In many circumstances the provisional application of a treaty is effective only if it is executed in domestic legal order. The understanding of the practice of other States raises the awareness of the advantages and the difficulties of provisional application which in many cases can be overcome by introduction of a proper internal law mechanisms.

Thank you Mr. Chairman