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on the work of its sixty-eight session**

Part II and III

Agenda item 78

S T A T E M E N T

BY

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Mr. Chairman,

In this statement I will address three chapters of ILC Report from its sixty eight session envisaged for cluster two and additionally issues of immunity of State officials from foreign criminal jurisdiction and provisional application of treaties.

Crimes against humanity

Mr. Chairman,

Poland commends Special Rapporteur Sean Murphy for his second report and welcomes adoption by the Commission of six new draft articles regarding the topic "Crimes against humanity". We are of the view that the preparation of draft articles on this topic is of particular importance. This endeavor can close the regulatory gap in combating the most heinous crimes under international law.

Poland takes this opportunity to present several specific comments. Firstly, there is a need to indicate, for clarity reasons, in provision relating to the right of States to establish national jurisdiction, contained in draft article 6 paragraph 3, that this right should be exercised without prejudice to any applicable rules of international law.

Secondly, in draft article 8 paragraph 3 we propose replacing the term "immediately" by the term "without delay". Such a terminology would more precisely exemplify international standard in this regard, particularly that contained in Vienna Convention on Consular Relations.

Thirdly, for the same reasons Poland suggests replacing the term "representative of state" by the term "consular post" in draft article 10 paragraph 2.

Fourthly, we would like to recall our statement from previous year, when we said that it is worth to consider introducing to the draft a victim-oriented approach, with particular regard to the most vulnerable category of victims, notably children. Consequently, this approach ought to be reflected in draft article 1 by adding that it apply also to "a remedy and reparation for victims" and draft article 2.

Finally, as regards draft article 4 paragraph 2 we are of the view that ending formulae should read „as justification of failure to prevent crimes against humanity”. This would be in line with the commentary stating that this “paragraph is addressing this issue only in the context of the obligation of prevention”.

Protection of the atmosphere

With respect to the issue “Protection of the atmosphere” Poland would like to express its appreciation to Special Rapporteur Mr. Shinya Murase for his fourth report. Poland would like to suggest inserting into the definition of "atmospheric degradation" the phrase "ambient air quality", which is term of art in this field. Furthermore, we also suggest replacing the last sentence of the commentary to guideline 3 by the following: "In this context, it should be noted that not only is the Paris Agreement acknowledging in the Preamble that climate change is a common concern of humankind, but also ambient air quality is a common concern of humankind, according to WHO Ambient Air Quality Standards and Guidelines. This clearly shows the importance of ensuring the integrity of all ecosystems, including oceans and the protection of biodiversity”.

Ius cogens

Mr. Chairman,

Allow me now to turn to the topic “Ius cogens”. My delegation would like to thank Special Rapporteur Dire Tladi for his first report containing three draft conclusions. We would like also to congratulate the Commission for streamlining these conclusions. We support the approach taken by ILC to recognize as a starting point of considerations the provisions of the Vienna Convention on the Law of the Treaties. With reference to discussions held during the sixty seventh session on this topic, Poland is of the view that the concept of regional ius cogens is in contravention, by definition, with the notion of norms ius cogens itself and therefore should not be accepted. It cannot be reconciled with paramount prerequisite of norm ius cogens that is acceptance and recognition by the international community of States as a whole .

Furthermore, Poland is of the view that all norms of *ius cogens* are obligations of *erga omnes* nature but this does not work in the other direction. Norms recognized as having an *erga omnes* validity set up undoubtedly important obligations but this importance does not determine that they have also *ius cogens* status. In general we consider norm *ius cogens* as a special quality of particular norms and not as kind of specific, additional source of international law.

Referring to the issue of possibility of developing an illustrative list of norms that had acquired the status of *ius cogens*, we notice that the Commission in its report on fragmentation of international law has already indicated “the most frequently cited candidates for the status of *ius cogens*”. Reference to examples of these norms were also made in other past works of the Commission. In our view the main added value of ILC endeavor in this regard would rather be explaining in more detail the criteria for identification of norms *ius cogens*, relations of these norms with other, particularly non-treaty, rules of international law and studying issues of effectiveness and enforcement of these norms.

Immunity of State officials from foreign criminal jurisdiction

With respect to the topic “Immunity of State officials from foreign criminal jurisdiction” my delegation would like to commend Special Rapporteur Concepción Escobar Hernández for very thorough and informative fifth report. Issues relating to immunities of general character are always of great interest from the perspective of states. Thus, Poland analyzed the work of the Commission of this topic very carefully and has submitted extensive comments, orally and in writing.

We notice that discussion in the ILC on new draft article 7, relating to crimes in respect of which immunity does not apply, has not finished yet. Nonetheless, we would like to adhere to this process with several remarks.

With regard to draft article 7 paragraph 1 letter (b) and (c) it is essential to specify what kind of criteria were applied in order to indicate the crimes in respect of which immunity does not apply. With regards to the crime of corruption it is necessary in our view to elaborate in commentary the definition of this crime. Commentary should also indicate that the list of crimes contained in paragraph 1 has exhaustive character if this is the ILC’s intention.

Provisional application of treaties

Mr. Chairman,

Referring to the topic “Provisional application of treaties”, Polish delegation would like to thank Special Rapporteur Juan Manuel Gómez-Robledo for his fourth report, which included a proposal for a draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty. We would like as well to congratulate the Commission for adopting draft guidelines 6 to 9.

Poland supports the general position of the ILC that provisional application of a treaty in principle produces the same legal effects as if the treaty were in force, unless the treaty provides otherwise or it is otherwise agreed. However, it seems that the nature and effects of the provisional application should be further studied and the comparative analysis of treaty practice is necessary in that regard.

As the relation between provisional application and reservations is concerned we endorse the opinion that the issue should be given careful attention. In particular, we find it somehow difficult to accept the right of formulating reservations with regard to the provisional application of a treaty. In accordance with the Vienna Convention on the Law of Treaties and international customary law reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. Thus, it is a normal practice that reservation activates only after expiration of provisional application, that is when the treaty enters into force. Any limitation to the provisional application of a treaty should be formulated in a treaty itself or in an agreement (whatever its form is) on the provisional application a treaty.

Furthermore, in our view the Commission, either in a conclusion or a commentary, should confirm the right of states to apply a treaty provisionally within the limits of their internal law. Such provisional application cannot be considered as reservation itself since very often the provision on such an application is already inserted into a treaty. The latter scenario is, as some members of the Commission have also noticed, often the most important, and contentious, aspect of provisional application. In this context, draft guideline 10 should be further carefully considered and streamlined.

Finally, Poland would like to reiterate that we concur with those members of the ILC who indicated that an exhaustive treatment of treaty provisions providing for provisional application is essential in order to gain better understanding of the topic. Thus, there is a need for more in-depth study of treaty practice particularly with respect to treaties that refer to the rights of individuals.

Thank you Mr. Chairman.