REPUBLIC OF POLAND

PERMANENT MISSION TO THE UNITED NATIONS

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Report of the International Law Commission on the work of its seventy first session

Part I

Agenda item 79

STATEMENT

BY

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Mr. Chairman,

At the outset, let me congratulate the Chairman of the International Law Commission (ILC) Mr. Pavel Sturma, on his presentation of the Report of the Commission from its seventy-first session.

Poland recognizes the Commission as a body which can contribute through its work to the rule of international law. Clearly, the Commission is not (and should not be) alone in this task. In particular the dialogue with States in the framework of the 6th Committee, should aid the Commission in performing its task. Poland is a strong supporter of strengthening the dialogue between the Commission and the States. One practical element in this respect is the issue of ensuring swift availability of the ILC Report, which would enable a greater chance to prepare the comments by States. Thus, we consider the practice of publication of advanced copy as a very useful instrument that should be continued. Furthermore, we would like to also express our particular gratitude for the possibility of exchanging views with the Chairman of the International Law Commission during the recent Council of Europe CAHDI session.

At the same time, we would like to draw attention to the fact that the Commission took somewhat different approach with respect to different topics. The comparison of the work on the issue of immunity of states from foreign criminal jurisdiction on the one side, and on the topic of peremptory norms of general international law, on the other, provide a useful example in this respect. While the former seems to be carefully discussed within the Commission and with States, the latter, although equally important, was completed by the ILC in a rather swift manner and without in-depth dialogue with States, which, in turn, could have repercussions for the results of the work of the Commission. We would hope that the latter *modus operandi* does not set a precedent for how the Commission works on its projects. Overall, I would like to underline that these examples should be taken into account to prove the point concerning the procedural aspects of the work of the Commission and should not cast shadow over undeniably important, substantial work the Commission is doing in this respect.

Crimes against humanity

Mr. Chairman,

With regard to the topic "Crimes against humanity" Poland welcomes the adoption by the Commission of the set of articles on the second reading and would like to thank in particular the Special Rapporteur Mr. Sean Murphy for his fourth report and generally for the able leadership

he continues to provide. As upholding international law is one of our priorities, we are of the view that supplementing current international framework concerning prevention and punishment of atrocity crimes is of vital importance. Thus, my delegation believes that there is a need to continue the work, including through convening of the intergovernmental conference of plenipotentiaries, towards drafting a convention on the basis of the articles prepared.

At the same time, we reserve the right to provide some detailed comments concerning the text of the articles during subsequent work in this respect.

Peremptory norms of general international law (ius cogens)

Mr Chairman,

Referring to the topic "Peremptory norms of general international law (*ius cogens*)" let me, at the outset, strongly emphasize, in line with the provisions of the Vienna Convention on the Law of Treaties, that we consider these norms are a cornerstone of the international legal order. This is the reason why, in our view, this topic requires particularly careful consideration in order to uphold the importance of these norms for international community and to avoid any possible confusion with respect to overly easy identification and subsequent application. Against this background, the adoption by the ILC of the conclusions on peremptory norms of general international law, on the first reading, already in this year has been a rather unexpected step. It is worth recalling that the Commission decided to work on this topic in 2015. Nevertheless, in the ILC reports from 2016 to 2018 there was no information that the Commission adopted any of the conclusions proposed by the Special Rapporteur, neither there was any accepted commentary to conclusions that could be subject to comments of States. As mentioned before, we would recommend this extraordinary method of work is not followed by the ILC in the future.

Referring to the document adopted by the Commission, Poland would like to draw attention to possible divergences between the Commissions' conclusions in this respect and the International Court of Justice judgement in the case *Jurisdictional Immunities of the State*. It should be noted that in paragraph 93 of the said judgement the ICJ stated that there is no conflict between rules of *ius cogens* and the rules on state immunity as the latter are procedural in character. Nonetheless, neither the conclusions, nor the commentary refer to or reflect such a legal solution. Conversely, when reading conclusion 3, hierarchical superiority mentioned there does not find any exception and is not in any way limited or adjusted. As the "*conclusions are aimed at providing guidance to all those who may be called upon to determine the existence of*

peremptory norms of general international law this issue rise" that is *i.a.* domestic courts, it would seem necessary that this issue was further addressed and clarified.

Poland supports the conclusion 6, in particular insofar as it emphasizes the distinction between the acceptance and recognition of the *ius cogens* norms, on the one hand, and acceptance and recognition of norms of general international law, on the other. However, in this context one cannot help but notice that such a conclusion does not seem to be reflected in the remainder of the Commissions' project in this respect.. In particular, the ILC is indicating in conclusions 8 and 9 a requirement for acceptance and recognition of *ius cogens* norms on the same level as norms of general international law or even on the lower level. For example, in conclusion 9 para 2, the ILC recognizes that expert bodies can serve as subsidiary means for determining the peremptory character of the norm despite the fact that in conclusions on identification of customary international law, prepared just recently, such entities were not mentioned at all.

With respect to conclusion 7 para 2 and the notion of "very large majority of states" required for the identification of peremptory norm, we would like to recall our position in this respect. Namely, in our view it is not only the sheer number of states, but also their representative character that matter. Such an understanding could translate into using the terminology like for example "an overwhelming and representative majority of States", instead of current wording (referring to "great majority of States").

As regards the conclusion 13, Poland does not see a legal possibility to make reservation to a treaty provision that reflects a peremptory norm of general character. Firstly, due to the fact that such a reservation would likely be contrary to the very object and purpose of the treaty and, secondly, because such a reservation can affect the binding nature *of ius cogens* norm if this treaty provision is the only basis of the peremptory norm concerned.

With respect to the issue of legal consequences of peremptory norms, we would recommend that the ILC should consider introducing additional conclusion with respect to the relation between *ius cogens* and general principles of law (as it did with respect to other sources of international law).

Finally on conclusion 19 we would like to draw the Commission's attention to the consistent position that has been presented by the Republic Poland with regard to the ILC reports, on the need for greater scrutiny of the duty of non-recognition. The conclusion and commentary in this respect repeat to a large extent the ILC commentary from 2001, despite the new significant practice in this respect such as i.a. the UN General Assembly resolutions on Crimea or the decision of European Court of Human Rights concerning the scope of the exception to the duty of non-recognition. Moreover, the idea that only *serious* breach of *ius cogens* norm implies the duty

of non-recognition, requires further consideration. In particular, question arises whether there can be only a "simple" breach of *ius cogens* norm which does not imply non-recognition obligation.

Other decisions and conclusions of the Commission

Mr Chairman,

Poland takes note of the fact that the Commission included in the long-term programme of its work two topics: reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law and prevention and repression of piracy and armed robbery at sea. Allow me to make brief comments in this respect.

When it comes to the topic "reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" we are of the view that this issue does merit attention. Already in 1969 in the ECOSOC discussions on punishment of war criminals Poland raised the issue of the compensation to the victims of these crimes. We still hold the opinion that this issue requires further discussion as it could assist the international community in upholding international peace and security. It is our view that one of the sources of inspiration for the Commission could be the jurisprudence of European Court of Human Rights relating to situations of armed conflicts.

Finally, Poland holds the opinion that there exists the appropriate international legal framework for combating piracy and armed robbery. In addition to the United Nations Conventions on the Law of the Sea, a so-called 'Constitution for the Oceans' that sets out the legal framework within which all activities in the oceans and seas must be carried out, there are numerous instruments adopted under the auspices of the International Maritime Organisation, including conventions, resolutions, recommendations and guidelines concerning this issue. Hence, we are of the view that international law on piracy is rather clear and does not require further elaboration. Situation may be different when it comes to respective national laws of various countries in that respect.

Thank you Mr. Chairman