REPUBLIC OF POLAND

PERMANENT MISSION TO THE UNITED NATIONS

750 THIRD AVENUE, NEW YORK, NY 10017 TEL. (212) 744-2506

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STATEMENT BY THE REPUBLIC OF POLAND

77TH UNITED NATIONS GENERAL ASSEMBLY

SIXTH COMMITTEE
AGENDA ITEM 77:
"REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SEVENTY-THIRD SESSION"
CLUSTER 2

NEW YORK, 27TH OCTOBER 2022

Mr. Chairman,

I present the Republic of Poland's comments on Chapter VI, "Immunity of State officials from foreign criminal jurisdiction", and Chapter IX, "Sea level rise in relation to international law", of the International Law Commission Report from its seventy third session.

Mr. Chairman,

With respect to the **"Immunity of State officials from foreign criminal jurisdiction"**, my delegation notes the Commission's adoption on its first reading of 18 draft articles and a draft annex together with commentaries.

We recognise a genuine effort by the Committee and Special Rapporteur Ms. Concepción Escobar Hernández to craft a set of draft articles that optimally reflect a number of legal issues that arose during its preparation, especially in regard to striking a balance between immunities-related law, which is rooted in the principle of sovereign equality, and the need to combat impunity for the most heinous crimes under international law.

We also understand that the draft articles concern primary norms of international law and are without prejudice to applicable secondary norms, in particular circumstances precluding wrongfulness. Thus, in our view, when the prerequisites of circumstances precluding wrongfulness are fulfilled, states can invoke them also in relation to obligations concerning immunities of foreign officials.

With respect to the catalogue of crimes for which immunity does not apply (set out in draft Article 7), Poland has doubts about the appropriateness of omitting the crime of aggression from this article. The Commission justified this decision with two arguments: first, the requirement that national courts would have to determine the existence of a prior act of aggression by the foreign State; and second, the special political dimension of this type of crime because it is committed by political leaders. We ought to be aware, however, that to a large extent the same arguments could be applied to crimes against humanity and genocide. It is difficult to imagine that domestic courts can adjudge the responsibility of representatives of foreign states accused of having committed one of these crimes without directly or indirectly engaging the issue of the responsibility of foreign state. The same reasoning applies to war crimes. With respect to the ILC's second argument, it certainly cannot be denied that declaring that a representative of another state has committed a crime has significant political implications. Both current and historical practice involving disputes between states clearly indicates that genocide, crimes against humanity and war crimes all involve a political dimension comparable to that carried by the crime of aggression.

Furthermore, the need to reconsider the issue of crime of aggression insertion into draft article 7 flow also from the systemic perspective. Omitting this crime in the provision concerned seem to exclude the right of states that fall victim to aggression to exercise jurisdiction over individuals who have committed that crime against them, even when those persons are not protected by ratione personae immunity.

Mr. Chairman,

Let me now turn to the topic **"Sea level rise in relation to international law"**. In our comment last year, we underlined that since this topic can have very practical implications for state practice, there is need for transparency in the Commission's work, in particular by distinguishing between *lex lata, lex ferenda* and policy options. This preliminary issue is of fundamental importance because its study can encompass considerations which potentially go well beyond the traditional dichotomy of codification and progressive development. This is particularly visible in the context of continuity of statehood in situations where a state's territory suffers total inundation – until now a completely unprecedented circumstance. There is no state practice in this respect, and the historical precedents of temporarily losing control over state territory are not comparable as they were not caused by natural processes and did not have a permanent character. It would certainly appear that simply declaring that a state continues to exist, even when its territory is totally and permanently submerged, cannot suffice without some explanation of its future *modus operandi*. In this context, it is difficult to imagine that such a state could continue to exist without obliging other states to accept some limitations on their own sovereignty in the territorial or functional sphere. In consequence, this specific topic could require examination of the outer limits of international law's progressive development by the ILC.

Another point for the Commission to consider is whether this topic's extraordinary breadth lends itself to uniform treatment. This is clearly reflected in the practice of states that can be used as a point of reference. It is certain that while such a practice to some extend can be identified with respect to the law of the sea and perhaps also on the protection of persons affected by sea-level rise, the situation is completely different when it comes to the total inundation of a state's territory. Thus, there is need for serious consideration of dividing the topic, including due to the fact that the law of the sea and protection of persons pillars seem much more pertinent and demand a more urgent response in terms of proposed solutions than the statehood pillar.

I thank you.