

Comments of the Republic of Poland to the topic ‘Immunity of State officials from foreign criminal jurisdiction’

The Republic of Poland considers the ‘Immunity of State officials from foreign criminal jurisdiction’ as a topic of paramount importance. Already in 2015, Poland presented to the Commission an ‘Opinion by the Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on immunities of State officials from foreign criminal jurisdiction’ which evaluated, among other issues, terminological questions, the immunity *ratione personae* of representatives of States from foreign criminal jurisdiction, the immunity *ratione materiae* of representatives of States from foreign criminal jurisdiction, as well as the *ultra vires* acts.

It is worth reminding that Poland in the framework of the United Nations War Crimes Commission submitted formal indictments against Adolf Hitler and other prominent German Nazi leaders¹. Furthermore just after the conclusion of the Second World War, Poland significantly contributed to the development of law relating to accountability for the crime of aggression before domestic courts. In particular, the trial of Arthur Greiser, which took place in June and July of 1946 – i.e., before the Nuremberg Tribunal issued its verdicts – involved responsibility for crimes against peace before a Polish court (in this case, the Supreme National Tribunal). Similar trials were held in 1947 for Ludwik Fischer and in 1948 for Albert Forster and Josef Bühler before the Supreme National Tribunal. In all four cases, members of the German Nazi party (NSDAP) - holding senior positions in the administration of the occupied territories - were convicted for crimes against peace.

In this comment, Poland will limit its observations to the catalogue of crimes for which immunity does not apply (set out in draft Article 7). As we stated in the Sixth Committee debate in 2022 and in 2023, 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 war crimes, 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 a foreign state's responsibility. 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 substantial political dimension.

Furthermore it is to be noted that already in 2016, during the ILC deliberations on Article 7, a significant number of Commission members were in favour of including the crime of aggression in the catalogue of crimes for which immunity does not apply².

¹ <https://unwcc.org/wp-content/uploads/2023/08/UNWCC-and-Head-of-State-Immunity-master.pdf>

² Cf. A/CN.4/3328 Summary record of the 3328th meeting, p. 335; A/CN.4/3329 Summary record of the 3329th meeting, p. 340-341; A/CN.4/3329 Summary record of the 3329th meeting p. 342; A/CN.4/3331 Summary record of the 3331st meeting, p. 355; A/CN.4/3331 Summary record of the 3331st meeting, p. 355; A/CN.4/3331, p. 357; A/CN.4/SR.3360 Provisional summary record of the 3360th meeting, p. 8; A/CN.4/SR.3360 Provisional summary record of the 3360th meeting, p. 14; A/CN.4/SR.3361 Provisional summary record of the 3361st meeting, p. 8; A/CN.4/SR.3361 Provisional summary record of the 3361st meeting, p. 12; A/CN.4/SR.3361 Provisional summary record of the 3361st meeting, p. 14; A/CN.4/SR.3362 Provisional summary record of the 3362nd meeting, p. 12-13; A/CN.4/SR.3364 Provisional summary record of the 3364th meeting, p. 6; A/CN.4/SR.3364 Provisional summary record of the 3364th meeting, p. 15; A/CN.4/SR.3364 Provisional summary record of the 3364th meeting, p. 16.

Such an approach was in full conformity with the evolving discussion of the individual criminal responsibility of those perpetrating the crime of aggression against Ukraine and efforts towards establishing a potential special tribunal in this respect. Several recent statements by the group of states are based on the conviction that immunity *ratione materiae* does not apply to the crime of aggression:

- In a decision taken on 15 September 2022, the Committee of Ministers of the Council of Europe “noted with interest” the proposal submitted by Ukraine “to establish a special ad hoc tribunal for the crime of aggression against Ukraine”³. The Reykjavík Declaration from the 4th Summit of Heads of State and Government of the Council of Europe, which took place in Reykjavík on 16 and 17 May 2023, stated: “We welcome international efforts to hold to account the political and military leadership of the Russian Federation for its war of aggression against Ukraine and the progress towards the establishment of a special tribunal for the crime of aggression as highlighted at the Summit of the Special Tribunal’s Core Group chaired by President Zelenskyy (...) We call on all member States to ensure that perpetrators within their jurisdiction can be tried”.⁴;
- The European Council in its Conclusions of 23 March 2023 “firmly committed to ensuring full accountability for war crimes and the other most serious crimes committed in connection with Russia’s war of aggression against Ukraine, including through the establishment of an appropriate mechanism for the prosecution of the crime of aggression, which is of concern to the international community as a whole.”⁵. In its Conclusion of 29-30 June 2023, the Council welcomed “the fact that the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) is ready to start its support operations”⁶. Finally in its Conclusion of 26-27 October 2023, the European Council stated that “Russia and its leadership must be held fully accountable for waging a war of aggression against Ukraine and other most serious crimes under international law. The European Council calls for work to continue, including in the Core Group, on efforts to establish a tribunal for the prosecution of the crime of aggression against Ukraine that would enjoy the broadest cross-regional support and legitimacy”⁷;
- More than 30 states supporting the Bucha Declaration of 31 March 2023⁸ that: “Affirm that those responsible for planning, masterminding and committing the crime of aggression against Ukraine must not go unpunished”⁹;

³ Ministers’ Deputies, “Consequences of the aggression of the Russian Federation against Ukraine”, Decision taken at the 1442nd meeting, CM/Del/Dec(2022)/1442/2.3, 15 September 2022, para. 3.

⁴ United around our values - Reykjavik declaration (2023), p. 5 <https://edoc.coe.int/en/the-council-of-europe-in-brief/11619-united-around-our-values-reykjavik-declaration.html>

⁵ Conclusions – 23 March 2023, para 5, <https://data.consilium.europa.eu/doc/document/ST-4-2023-INIT/en/pdf>

⁶ European Council meeting (29-30 June 2023) – Conclusions, para 7, <https://data.consilium.europa.eu/doc/document/ST-7-2023-INIT/en/pdf>

⁷ European Council meeting (26-27 October 2023) – Conclusions, para 7, <https://www.consilium.europa.eu/media/67627/20241027-european-council-conclusions.pdf>

⁸ <https://www.president.gov.ua/en/news/povna-vidpovidalnist-ce-te-sho-privchaye-agresora-do-miru-vo-82009>

⁹ <https://www.president.gov.ua/en/news/buchanska-deklaraciya-shodo-vidpovidalnosti-za-najtyazhchi-z-82005>

- On 18 April 2023, the G7 states declared: “We support exploring the creation of an internationalized tribunal based in Ukraine’s judicial system to prosecute the crime of aggression against Ukraine”¹⁰;
- The 18th Plenary Session of the MLA Diplomatic Conference in Ljubljana on 26 May 2023 adopted the Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes, providing in Article 6 that the Convention can be applied to conduct which is a crime of aggression¹¹. Fifty-three states took part in negotiating that Convention, with another 15 present as observers¹².

All of these documents, which refer to the possibility of prosecuting perpetrators of crimes of aggression or criminal cooperation in this regard, do not provide for any exception due to the applicability of immunity for state officials. Nor do they contain any clause stipulating that states positions in question are without prejudice to the immunities of state officials under international law. Thus they constitute significant evidence of support for prosecution of the perpetrators of the crime of aggression, including before domestic courts.

Such an approach is also confirmed by the practice of individual states. For example, of the 23 states in the UN regional group of Eastern Europe, 18 criminalize aggression in their penal codes.

Furthermore, reconsideration of the issue of inserting the crime of aggression into draft Article 7 is also needed from a systemic perspective. Omitting this crime from the draft text would seem to exclude the right of states that fall victim to aggression to exercise jurisdiction over individuals who have committed that crime against them. Thus, there is a need to ensure that law relating to immunities of foreign officials coheres with the norms of *ius ad bellum* and *ius in bello*.

Finally, if the Commission were to decide to change the wording of draft Article 7 by deleting the list of crimes and replacing it with a generally formulated rule, Poland is of the view that the provision in question should declare that functional immunity is not applicable to crimes covered by the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.

¹⁰ G7 Japan 2023 Foreign Ministers’ Communiqué, 18 April 2023, <https://www.state.gov/g7-japan-2023-foreign-ministers-communicue/>

¹¹ Ljubljana-The Hague Convention On International Cooperation In The Investigation And Prosecution Of The Crime Of Genocide, Crimes Against Humanity, War Crimes And Other International Crimes 26 May 2023, Original: English , <https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention-English-v6.pdf>

¹² List of Participants, MLA/INF.1, 26 May 2023, Original: English, <https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/List-of-Participants.pdf>