



PERMANENT MISSION  
OF ESTONIA TO THE UN

## Statement of the Republic of Estonia

### 73rd Session of the United Nations General Assembly Sixth Committee

#### Report of the International Law Commission Cluster III

Mr Chairman,

Today I will address two topics: 1) succession of States in respect of State responsibility and 2) immunity of State officials from foreign criminal jurisdiction.

Mr Chairman,

On the topic of **succession of States in respect of State responsibility**, we would like to thank Special Rapporteur Mr. Pavel Šturma and the Drafting Committee for their hard work done so far.

With regard to the draft articles, we would like to comment the following. Estonia welcomes the inclusion of draft Article 5. It points out that the draft articles apply only to the effects of a succession of State occurring in conformity with international law. This is important for the sake of clarity and for the delimitation of the scope of draft articles. It is our understanding that the illegal acquisition of the territory (i.e. through illegal annexation) cannot generate the effects of succession between concerned States. In this sense, we are pleased, that in paragraph 85 of the report of the Special Rapporteur it has been pointed out correctly, that Estonia, Latvia and Lithuania, which restored their independence during 1990 and 1991 cannot be regarded as new States and successors of the Soviet Union, but as identical to these three States that existed before 1940.

Concerning draft Article 6 paragraph 4 we note that it could be useful to clarify the extent of obligations and responsibility arising from an internationally wrongful act that could be transferred to the successor State. Likewise, we think it would be useful if the term „newly independent State” would be defined or clarified in the commentaries to the draft articles. In addition, with regard to draft Article 7 paragraphs 2 and 3 it would be helpful to have explanations and examples on the expression „if particular circumstances so require”.

Estonia also supports the comments of some delegations made already last year that it would be very helpful to know which aspects of the draft articles contain existing State practice and which aspects have to be considered *de lege ferenda*.

Coming to the end of our comments on this chapter, we note the proposal by the Special Rapporteur on the subjects of subsequent reports and upcoming deliberations of the Commission. We consider the way forward proposed by the Special Rapporteur to be reasonable and we wish the Special Rapporteur and the members of the Commission success.

Mr Chairman,

Estonia welcomes the continuation of work by the Commission on **immunity of State officials from foreign criminal jurisdiction** and in this context we would like to express our appreciation to Special Rapporteur Ms Concepción Escobar Hernández for her dedicated work in preparing the 6<sup>th</sup> report on this important and complex topic.

We would briefly like to come back to our last year’s discussions when limitations and exception of immunity of State officials were discussed as they are also reflected in the 6<sup>th</sup> report. Estonia raised the issue that the crime of aggression should also be listed in draft Article 7 paragraph 1 among the list of crimes in which immunity *ratione materiae* do not apply. At that time this position did not get much support and views were expressed that decision should be made after the activation of International Criminal Court’s jurisdiction over crime of aggression. As the decision to activate the ICC’s jurisdiction entered into force on 17 July 2018, we would like to suggest that the Commission return to this issue. We can report that the Estonian

Penal Code does already contain a specific article on crimes of aggression, which has been drafted in accordance with the amended Rome Statute.

Estonia notes, that states have been invited to share their national legislation and practice concerning procedures on immunity. Although we have no national practice so far, we would like to mention that the Estonian Code of Criminal Procedure may be applied to a person enjoying diplomatic immunity or other privileges prescribed by an international agreement at the request of a foreign State, taking into account the specifications provided for in an international agreement (§ 4 p 3).

According to the Estonian Penal Code § 5 subsection 4, offences against humanity and war crimes shall be punishable regardless of the time of commission of the offence. § 81 subsection 2 states, that crimes of aggression, crimes of genocide, crimes against humanity and war crimes do not expire. According to § 88 subsection 1, the representative of State powers or the military commander who issued the order to commit the criminal offence, consented to the commission of the criminal offence or failed to prevent the commission of the criminal offence although it was in their power to do so or who failed to submit a report of a criminal offence while being aware of the commission of the criminal offence by their subordinates shall also be punished for a criminal offence against humanity and international security in addition to the principal offender. We would like to point out that the law is drafted in such terms that it can be applied to any representative of State power irrespective of which State they represent.

Estonia would also like to remind that all States have a shared responsibility to ensure that perpetrators of the most serious crimes do not escape justice. Immunities should not be implemented in a way that perpetrators of such crimes can escape justice and shield from accountability.

We agree with the Special Rapporteur and her comprehensive approach that there is a close relationship between the question of limitations and exceptions to immunity and efficient procedural safeguards. We agree with the position that distinction between immunity *ratione personae* and immunity *ratione materiae* should be maintained when addressing procedural provisions, as well as subsequently the safeguards.

Finally, we would briefly like to comment on three components of procedural aspects as suggested in the report and discussed by the Commission. What concerns timing of addressing immunity issues, we concur with the views expressed that the question of immunity should be raised and addressed at an early stage of the proceedings or at the earliest opportunity, otherwise it can lead to nullifying the effective use of the immunity rule. The acts of a forum State to which immunity applies as listed by the Special Rapporteur – detention, appearance as a witness and precautionary measures – are all relevant and deserve further attention. As most of the acts performed during criminal proceedings constitute constraining coercive measures and have a direct influence on the exercise of functions by an official, analysis of these aspects deserve particular attention.

What concerns the national authority who should determine immunity, it is for the court of the forum State to decide on the substance of the issue, whether immunity exists or whether there exist exceptions to immunity, although the role of other national authorities, such as investigative authorities or Public Prosecutor's office cannot be ruled out, in particular in the initial stage of criminal proceedings. The court may ask opinion from other relevant national authorities, for instance from foreign ministries.

We would also like to mention the role of international cooperation in these questions and raise a possibly more active role of the Security Council in referring cases to the ICC.

With that, Estonia concludes its statement and once again expresses its gratitude for the valuable and dedicated work done by the Special Rapporteur and the Commission on this topic.

Thank you for your attention.