

Comments of Estonia to the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction adopted by the International Law Commission

The draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the International Law Commission on first reading were sent to Governments for comments and observations by 1 December 2023 (Note LA/COD/61 of 26 October 2022).

Estonia welcomes the adoption of the draft articles and their commentaries on first reading by the International Law Commission at its 73rd session on 3 June 2022. We thank Special Rapporteurs Roman Kolodkin and Concepción Escobar Hernández for their hard work during all the years in leading the discussions and reporting on the topic.

In reply to the above-mentioned note, Estonia would like to provide some observations to the draft articles. In our commentaries, we would like to focus on the crimes under international law in respect of which immunity *personae materiae* does not apply.

Estonia appreciates the inclusion of draft Article 7, which provides that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in case of certain crimes under international law. Although immunity *ratione materiae* is necessary and important to facilitate inter-state relations and to provide independence for state officials when acting in official capacity, such immunity cannot excuse the commission of international crimes and prevent prosecution for international crimes. Indeed, such crimes can never be considered a function of a State and, consequently, “acts performed in an official capacity”. The commentaries to the draft articles show that the consideration of draft Article 7 has given rise to an extensive debate since 2016. While the International Law Commission provisionally adopted draft Article 7 and the related annex by recorded vote during in 2017, draft Article 7 was adopted without a vote and previously expressed divergent views were not clarified in the commentaries. The commentaries reproduce, with minor updates, the commentaries of 2017.

Estonia regrets that the list of international crimes mentioned in draft Article 7 does not include the crime of aggression. The latter is enshrined in the Rome Statute of the International Criminal Court like the crime of genocide, crimes against humanity and war crimes which are included in that list. All four Rome Statute crimes are also crimes under customary international law. In our view, the crime of aggression should be added to the list because it is not an ordinary international crime, but the supreme international crime that contains within itself the accumulated evil of the whole as it was described by the Nuremberg Tribunal. We recall that the jurisdiction of the International Criminal Court of the crime of aggression was activated on 17 July 2018. In addition, the crime of aggression is incorporate into the domestic legal system of numerous states. There is no doubt that the crime of aggression is a great concern for the international community as a whole, and states have to prevent its commission and punish its perpetrators. The crime of aggression enables and facilitates the commission of international crimes by creating an environment of chaos and lawlessness, and therefore no immunity *ratione materiae* should apply for it.

In the commentaries, the International Law Commission explains that it did not include the crime of aggression at this time due to the nature of the crime of aggression. Notably, national courts would have to determine the existence of a prior act of aggression by a foreign state and to consider the special political dimension of this crime, given that it is a leadership crime. Estonia agrees that national courts need to exercise extra caution when making jurisdictional decisions concerning the crime of aggression but these factors do not justify the exclusion of this crime from the list in question.

Because of the special nature of the crime of aggression, national courts in their proceedings must intrinsically take into account and analyse all relevant factual, political and legal aspects related to the crime of aggression. Here, states and international organisations (both global and regional) can provide useful guidance for national courts. For example, in the case of Russia's war of aggression against Ukraine, international organisations, in particular the United Nations, has on several occasions determined that the Russian Federation is carrying out a full-fledged unprovoked and brutal war of aggression against Ukraine. Determination of the war of aggression by an international organisation provides a strong and legitimate argument for national courts to decide that, *prima facie*, the crime of aggression has been committed and hence immunity *ratione materiae* does not apply.

Also, in the case of national courts making a decision whether war crimes have been committed, they must determine whether an armed conflict has occurred. When it is an international armed conflict, that is, an armed conflict between states, the decision is also politically sensitive and, to certain extent, comparable to the complexities and challenges concerning the determination of the crime of aggression. Various other serious crimes may, among other considerations, contain a politically sensitive element, but this does not mean that the perpetrators of such crimes should escape responsibility; moreover, national courts are accustomed to resist political pressure in their practice. Therefore, we do not see a danger in allowing national courts to decide the non-applicability of immunity *ratione materiae* regarding the crime of aggression.

Draft Article 7 includes an exhaustive list of international crimes in case of which immunity *ratione materiae* does not apply. Estonia believes that the list should be open-ended to take into account any further developments, for example, when new international crimes are codified or defined by the international community in the future. In addition, the International Law Commission admits in the commentaries that there are also other international crimes not included in the list that currently lack a universal definition under international law. We should be open to the opportunity for the definitions to develop at some point. Having an exhaustive list can unduly limit the positive effect of draft Article 7 in the future.

To conclude, Estonia calls upon the International Law Commission to reconsider the wording of draft Article 7. Once again, Estonia welcomes the opportunity to share its comments and observations, and we remain at the disposal of the International Law Commission to submit further comments and observations after the revision of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction.