



PERMANENT MISSION  
OF ESTONIA TO THE UN

## Statement of the Republic of Estonia

### 74th Session of the United Nations General Assembly Sixth Committee

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

Mr/Mrs Chairperson,

Today we will address three Chapters of the ILC Report: 1) Protection of the environment in relation to armed conflicts; 2) Immunity of State officials from foreign criminal jurisdiction; and 3) Sea-level rise in relation to international law.

On the topic of **protection of the environment in relation to armed conflicts**, we would like to congratulate Special Rapporteur Mrs Marja Lehto and the Commission for adopting on first reading a set of 28 principles with commentaries thereto.

The second report by the Special Rapporteur provides sufficient reasoning and background of the problems that are well supported by examples from history. The report narrows the topic and focuses on illegal exploitation of natural resources and unintended environmental effects of human displacement, rather than setting down general principles for protecting the environment in armed conflicts.

Let me now turn to some of the comments that Estonia has to the principles. We agree with the proposal in paragraph 193 of the Second Report of the Special Rapporteur, whereby no definition of the term “the environment” be included in the draft principles. However, we believe it might be wise to consider and specify, whether the environment under these principles includes also manmade environment or certain parts of it (parks, beaches etc.).

Principle 8 about human displacement refers to “other relevant actors” besides States and international organizations. While the commentary in paragraph 7 does include a list of such actors, the principle could make further explanation what kind of other relevant actors are meant hereby and why they are being addressed with these principles, considering that they may not all be subjects of international law.

Now we return for a moment to the principles proposed previously. Understanding that they are placed in two different parts of the list of principles, we still find principles 4 and 17 to be both repetitive and inconsistent. While principle 4 provides a recommendation (“should”) to designate protected zones, it is almost fully covered within principle 17 and the two should therefore be merged. Furthermore, principle 4 provides that protected areas could be designated either by agreement or otherwise, while principle 17 stipulates that only protected zones designated by agreement shall be protected against attacks, leading to the question, whether protected zones that are established otherwise shall be under the same protection or not.

Understanding that the wording “major environmental *and* cultural importance” is intended to leave open the precise meaning of this requirement on purpose and that it is sometimes difficult to distinguish the two, the wording could be amended so that it is clear whether both the conditions – environmental and cultural – need to be fulfilled or just one of them.

Principle 13 stipulates that no part of the natural environment may be attacked, unless it has become a military objective. We feel that this, perhaps unintendedly, leaves out situations, where parts of the natural environment are attacked during military exercises.

Estonia once again congratulates the Commission and the Special Rapporteur for the important work done so far and we look forward to provide written contribution by 1 December 2020.

Mr/Mrs Chairperson,

Estonia would like to continue by making some comments on **Immunity of State officials from foreign criminal jurisdiction**. First, we would like to thank ILC for their report on immunity of State officials from foreign criminal jurisdiction and continuous attention on this important and complex topic. In particular, we would like to extend our appreciation to Special Rapporteur Ms Concepción Escobar Hernández for continuation of her dedicated work and for presentation of the 7<sup>th</sup> report. As consideration of the 6<sup>th</sup> report continues, we would also like to refer back to some of our previous submissions.

We would like to reiterate some of the comments we have made in previous years, which we find are still relevant, as we have not been alone in raising the issue that the crime of aggression should be listed in draft Article 7 paragraph 1 among the list of crimes in which immunity *ratione materiae* do not apply.

At this point of time, we welcome new draft articles on procedural provisions and safeguards as suggested by the Special Rapporteur. New draft Article 8 consideration of immunity by the forum State reflects the general understanding expressed last year that application of immunity should be considered at an early stage of the proceedings. We maintain our support to this position and reiterate that 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.

We also express our support to draft Article 9 determination of immunity pointing out to the role of courts of the forum State. We agree that it is first of all for the court of the forum State to decide, whether immunity exists or not. As the draft article does not rule out the role and participation of other national authorities, we would like to support the suggested draft article. We concur with the Special Rapporteur that the role and participation of other state organs cannot be ruled out. Taking into account our national law and experience, we have previously referred to the possible role of investigative authorities or Public Prosecutor's office, in particular in the initial stage of criminal proceedings. The court may also ask for information or opinion of other competent national authorities, for instance from foreign ministry.

We follow with interest the ongoing discussions on determining immunity, notably taking into account a new proposal of the Drafting Committee having submitted a draft article 8 *ante on applicability of procedural provisions and safeguards of part IV in relation to any criminal proceeding against a foreign State official, ..., that concerns any of the draft articles contained in Part Two and Part Three ..., including to the determination of whether immunity applies or does not apply under any of the draft articles.* In the light of this new suggestion, which has not yet been thoroughly discussed by the ILC, we understand that this provision deserves further discussion also in the light whether this could have possible impact to other relevant draft articles already submitted, as the draft articles on the topic are mutually interrelated.

We are grateful to the Special Rapporteur for paying in her 7<sup>th</sup> report particular attention to the procedural safeguards and for presentation analyses of due process principles and suggesting wording of draft Article 16. When considering application of immunity, principles of fair proceedings are applicable and relevant as indicated above. An official of a foreign State being an alleged offender shall at all stages of the proceedings be guaranteed internationally recognized procedural rights during investigation, detention and trial stage under applicable national and international law. In national proceedings, national law applies, but we would also like to stress that it should comply with international law principles.

We welcome inclusion of draft Article 16 on procedural rights and safeguards of a foreign official guaranteeing fair and impartial treatment of the official. Paragraph 2 of draft Article 16 specifies that it applies to determining the application of immunity from jurisdiction and in any court proceeding initiated against the official. We would like to suggest considering adding "in any proceedings where deprivation of liberty of the official is determined" or "in any proceedings affecting person's liberty" before any court proceeding. A foreign official should have due process guarantees during different stages of criminal proceedings from the initiation of the proceedings, preliminary investigation, in particular when deprivation of liberty is concerned, to the court proceedings. As everyone has the right to liberty and security guaranteed by human rights treaties, we would like to suggest inclusion of this principle also in this context, moreover as in the next paragraph cases affecting person's liberty are mentioned.

Paragraph 3 of draft Article 16 refers to obligation to inform the nearest representative of the State of the official in cases affecting person's liberty. We would like to suggest to specify the notion "nearest representative of the State of the official" by adding "competent" or "appropriate", so it would be "nearest competent representative of the State of the official" or "nearest appropriate representative of the State of the official". It can be the case that the nearest representative of the State of the official cannot be considered the competent/appropriate authority of the State of the official to deal with this kind of information.

Estonia once again expresses its appreciation for the work done by the Special Rapporteur and the Commission on this topic.

Mr/Mrs Chairperson,

Turning now to the topic of **Sea-level rise in relation to international law**, we welcome very much the inclusion of the topic in Commission's long-term programme of work and thank the Study Group (Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria) for their readiness to work on this topic. We are convinced that the work of the Commission helps to codify and develop international law rules in this important and critical field.

The consideration of this subject by the Commission is very valuable for international community, especially for small island States and low-lying coastal States. One meter of change in sea level may pose potentially serious or even disastrous threats to heavily populated and low-lying coastal areas as well as for small island States.

Estonia would like to emphasize that in connection with the sea-level rise eventually the constituent elements of the State – especially the territory – as well as well-established rules of maritime delimitation could be challenged. This clearly illustrates the importance of this topic for international community.

Another very important aspect in connection with this topic is the protection of persons affected by the sea-level rise. We hope to see in the reports of the

Commission a comprehensive study of issues arising in the context of protection of affected persons. All aspects mentioned in this regard in paragraph 17 of the report are fully valid and we would welcome addressing them in future reports of the Commission.

We, the lawyers, are used to base our arguments on precedents. We search for analogies because we would like to maintain legal certainty. However, this very specific topic “Sea-level rise in relation to international law” requires also an analysis of unprecedented issues - suitable analogies are here not necessarily available. Consequently, we need to consider unconventional solutions and think in some cases outside of the box.

Mr/Mrs Chairperson,

Coming to the end of our comments, we would like to note, that the topic sea-level rise in relation to international law identifies a number of areas of international law that need to be analysed with the view of the question whether only norms *de lege lata* can be relied upon or if norms *de lege ferenda* need to be proposed. We see the potential of the outcome of the Commission to be most likely of great influence to the international law, including law of the sea and keeping that in mind, we wish the Commission and the Study Group all the success in their endeavours.

Thank you for your attention.