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Views of the Government of Estonia regarding the International Criminal Court

1. The Government of Estonia would like to express its gratitude to the Swedish Foreign Ministry for organizing a meeting in June this year for the Nordic and Baltic countries and Poland to exchange views and experiences on the International Criminal Court (ICC) implementation process. It was a truly helpful initiative.

2. The following is a description of the Estonian approach to the implementation of the Rome Statute with regard to the substantive criminal law issues, with emphasis on the crimes listed in the Statute.

3. One of the key notions of the Rome Statute is complementarity. It can be understood as a guarantor of enforcement of the norms stated in the Statute, rather than as a threat or as a constraint on national legislators and prosecutors. Although very sensitive, it still represents a balance between enforcement of international norms and the protection of State sovereignty. It must be noted that the emphasis of the Rome Statute is on the domestic courts, and that arrest and penal condemnation should be viewed as the prerogative of the State. The International Criminal Court can be seen as recognizing complementarity as an exception to that prerogative.

4. No provision in the Rome Statute imposes on a member State an obligation to prosecute the perpetuator of offences listed in article 5. Such is not the case, however, with other legal instruments: for example, the obligation to prosecute can be found in the Geneva Conventions of 1949 and the Genocide Convention of 1948. The primacy of commencing proceedings in a domestic court does not mean that the State should enact identical legislation to that prescribed in the Statute in order to pass the complementarity test. The complementarity principle should be seen as a justified leeway for the domestic legislators to determine the wording of the provisions in their legislative acts and a leeway for the domestic prosecution offices to decide on what charges will be and when to bring them.

5. Under the rule of complementarity ICC only exercises jurisdiction when the domestic judicial system is genuinely unwilling or unable to do so properly itself. We believe that the fears of prospective misinterpretations or misuse of this power by the Court are unfounded. On the contrary: although the Rome Statute might entail gaps like any other legal act, before the Court starts functioning, these allegations are only part of academic or political discussions. The right of ICC to decide whether the case is admissible or not under article 17 is a vital element of its functional capacity. Therefore the Statute upholds in principle a valuable system, where on the one hand the sovereign interests of States are protected by States being the primary forum to adjudicate. On the other hand the Court can be ready to adjudicate in cases where, for instance, States produce sham proceedings or face the collapse of a judicial system. Nevertheless, one has to bear in mind that a possible exception to the primacy of the domestic forum can be a case where a State does not have penal legislation covering the crimes within the jurisdiction *ratione materiae* of the Court, a possibility where the State can be determined as genuinely unable to prosecute. That is why it is important for the States themselves, above all, to

analyse their penal laws in the domestic implementation process.

6. With regard to the Estonian approach in the implementation of the Statute, no fundamental amendments to the penal legislation need to be made. This is due to the fact that in the new Penal Code adopted this summer the developments in international criminal law have been taken into account. That is why Estonia can rely on the existing penal law instead of enacting new legislation that might better reflect the Statute. This point may be illustrated by reference to the crimes listed in the Statute.

1. Genocide

7. As stated above, the internal legislation need not be identical with the wording of the Statute. In the Estonian Penal Code, the definition of genocide is derived from article 2 of the Genocide Convention and that definition has been enacted in many criminal laws of various States. It provides for various acts such as murder, causing serious mental or physical harm, etc., the element of intent to destroy in whole or in part and also a target group. As a supplementary element the Code provides that a group resisting an occupying regime may also be regarded as a target victim of the crime of genocide. Although the Genocide Convention does not provide for this group, the drafters have regarded it necessary to mention it specifically, for reasons of historical experience. Genocide has a broader meaning in customary international law as well. For instance, France has enacted provisions to the effect that genocide can be committed against any definable group. Giving a broader meaning does not of course mean that it will be in conflict with international law.

2. Crimes against humanity

8. The wording of the Penal Code is in conformity with article 7 of the Rome Statute. The drafters of the Code have been guided by article 18 of the ILC draft Code of Crimes against the Peace and Security of Mankind. The provision uses a more abstract wording: the phrases "unfounded deprivation of liberty" and "other wrongful treatment" enacted in the Penal Code should cover the acts not enumerated here compared to article 7 of the Rome Statute. The Estonian Penal Code also provides that the unlawful acts must be instigated or directed by a State, an organization or a group. Article 7 of the Rome Statute does not entail such a requirement. However, it is our belief that it should not become an impediment since the crimes are of a nature which require, due to their systematic or large-scale character, some kind of organized behaviour. The main difference stated in the Penal Code between genocide and crimes against humanity is the immediate object of the crime: in the case of genocide the act is intended to destroy a specific group and the act is strongly related to the general ban of discrimination. In the case of crimes against humanity, no strictly specified group is necessitated; the act must be done on a large scale or systematically and have been instigated by a State, an organization or a group. The Penal Code defines both crimes as offences against humanity. The Supreme Court of Estonia has in one of its rulings found that the difference between an offence against humanity and an "ordinary" crime, for example murder, is the following:

> "[I]n the case of an ordinary crime the perpetrator does not deny the injured virtue (e.g. life) itself. He does not place himself alongside or higher in the system of virtues. When he kills a person, he still recognizes life as a virtue, although he finds justifications for his act. In case of offences against humanity, the perpetrator places himself, for various reasons (mostly ideological or religious), outside the system of virtues. He acts in the name of other purposes (e.g. ethnic cleansing) and the virtues that are attacked — life, health, physical integrity — in that context are meaningless. The attack is not directed at a specific victim; the victim can be any person."

3. War crimes

9. In the classification process of war crimes, the drafters of the Estonian Penal Code have focused on the direct object of the crime. In delimiting the sanctions, the dangerousness of the act has been taken into account; persons hors de combat are regarded as persons who need the most protection. The Penal Code provides for a large number of war offences: military activities against the civilian population, illegal use of the means of warfare against the civilian population, attacks against prisoners of war and interned civilians, attacks against protected persons, the use of prohibited weapons, attacking a non-military object, etc. The developments of international humanitarian law, i.e. the criminalization of acts under common article 3 of the Geneva Conventions and the recognition of its customary status, are also reflected in Estonian

criminal law since the criminalization of the acts does not depend upon the nature of the conflict. This was explicitly stated in the first version of the Penal Code, but was subsequently deleted and the adopted text of the Code is silent on the matter. The authors of the draft were of the opinion that the acts listed in the Code can nevertheless be regarded as applicable to both international and internal conflicts since the relevant international instruments are binding on Estonia and are part of the legal system and are superior to the internal legislation.

10. An offence which was committed during the time of war and is not prescribed in the war offences division of the Penal Code is punishable under other provisions of the special part of the Penal Code. A person who has committed an offence prescribed in the war offences division can be punished only for the commission of a war crime even if the crime corresponds to other essential elements of an offence proscribed in the special part of the Code. In that way the domestic system is genuinely enabled to prosecute and avoid possible interference by ICC.

The defence of superior orders and the responsibility of commanders

11. The Penal Code does not provide for the defence of superior orders as prescribed in article 33, paragraph 1, of the Rome Statute. The agent of State authority can be regarded as the commander of the civil authorities. Due to the novelty of the Penal Code, it also contains the relevant provisions that deal with the concept of the responsibility of commanders. It should be noted that, in conformity with international law, the superiors are responsible for the commission of the international crimes of their subordinates, not for all of their offences. Responsibility shall arise when the superior has given a command, when the offence was committed on his consent or when he has not prevented the commission of the offence although it was in his power.

No statute of limitations

12. The Estonian Penal Code provides that statutory limitations do not apply to offences against humanity, war offences and offences that shall be punished by life imprisonment.