

**Statement by Mr. RHEE Zha Hyoung**

**Counsellor of the Republic of Korea to the United Nations**

**General Assembly Sixth Committee**

**Report of the International Law Commission on the work of its sixty-seventh session [Agenda 83]**

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Thank you, Madam Chair,

My delegation would like to deal with the three subjects, under discussion in cluster 2.

First, with regard to Identification of Customary International Law, my delegation expresses its sincere thanks to the Special Rapporteur, Sir Michael Wood, on his third report. We also thank the drafting committee, which was responsible for provisionally adopting 16 draft conclusions.

My delegation is of the view that it is difficult to make practical comments on these draft conclusions which are not accompanied by relevant commentaries as yet. While my delegation would like to make brief comments, our further comments will be made again next year when the ILC formally adopts the commentaries on this topic in 2016.

My delegation would like to make six comments on issues related to the draft conclusions provisionally adopted by the Drafting Committee.

The first point is related to paragraph 3 of draft conclusion 4, concerning the role of the conduct of other actors in the assessment of the evidence of a rule of customary international law. The commentary should provide a detailed and sufficient explanation of the specific circumstances where the conduct of other actors may be relevant, in consideration of the fact that there are different views as to whether certain non-State actors can play an important role in the formation of rules of customary international law.

The second point concerns paragraph 3 of draft conclusion 10, relating to the clarification of requirements or elements of inaction. This draft conclusion seems to oversimplify the very delicate legal question concerning 'inaction'. My delegation expects a detailed explanation of the phrase "the circumstances called for some reaction" in the commentary.

The third point pertains to the criteria for the determination of the relevance of a treaty provision as evidence of a rule of customary international law. As paragraph 2 of draft conclusion 11 stipulates that "The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law", the commentary should provide sufficient explanations on the criteria applied in determining whether a treaty rule reflects a rule of customary international law.

The fourth point relates to the evidentiary value of the resolutions adopted by international organizations or at intergovernmental conferences in provisionally adopted draft conclusion 12. The ILC should approach the assessment of the evidentiary importance of these resolutions with great caution, because not all resolutions are considered to have the same value. Thus, the elements required, including the composition of the international organizations, the results of the voting and the voting procedures in adopting the resolutions, as well as the objective of the resolutions, should be clarified in the commentary.

The fifth point is closely connected with the considerable controversy over the so-called doctrine of the 'persistent objector'. My delegation would like to express its concerns about the provisional adoption of draft conclusion 16. My delegation notes that the concept of persistent objector is one of the most controversial issues in the theory of customary international law.

I quote from the paragraph 93 of this year's ILC Report: "The persistent objector rule was the subject of wide-ranging debate. Several members supported the inclusion of the rule in the set of draft conclusions, while some other members considered that it was a controversial theory not supported by sufficient State practice and jurisprudence, and which could lead to the fragmentation of international law." As such, the final draft conclusions on this topic should maintain a high level of clarity, so that they can be used as practical guidance for national and

international legal practitioners.

Lastly, my delegation is of the view that the ILC should carefully review issues, rather than rush to the draft conclusions in 2016.

Again, my delegation would like to express its appreciation to the Special Rapporteur Sir Michael Wood and the ILC for their excellent work.

Second, regarding the Crimes against humanity, my delegation welcomes the first report submitted by the Special Rapporteur, Professor Sean Murphy, and also the adoption of the four draft articles and their commentaries. My delegation further welcomes the Commission's accomplishment of concrete results even at the initial stage of the process. Since this is an extremely timely topic, coming up with the final results at a time as early as possible is sure to be welcomed by the international community.

The main purposes of this work are not only to strengthen international cooperation for the prevention and punishment of crimes against humanity, but also to create a model for domestic legislation on such crimes. Therefore, if the provisions of the prospective Convention on Crimes against Humanity are significantly different from those in existing domestic laws or impose exceedingly burdensome obligations on States, we could expect considerable hesitation on the part of the States in joining the Convention. In this regard, close consultation between States and the ILC, particularly in the Sixth Committee, will be quite useful.

My delegation supports the Commission's formulation of Draft Article 3, as it is based on the Rome Statute of the International Criminal Court, thus preventing unnecessary conflict with the Rome Statute and according due respect to the ICC as well. As the Special Rapporteur stated in the First Report, this Convention should avoid conflict with relevant treaties, including the Rome Statute. In this regard, in the process of drafting this Convention, it is necessary to conduct a detailed examination of the relevant provisions in existing treaties and the interrelationship of these provisions. Moreover, my delegation would like to emphasize that, if there is sincere willingness to strengthen the system for the prevention and punishment of crimes against humanity, it would be appropriate for parties to the prospective Convention to also become parties to the Rome Statute, thus obviating any possible impunity gap.

The 2016 to 2020 'Future Programme of Work' is provided by the Special Rapporteur in paragraphs 178 to 182 of the First Report. This is a tentative road map, but it will be fundamentally important in the future work of the ILC. The Special Rapporteur has mentioned that several issues, mainly various obligations of States and entitlement of the alleged offender to fair treatment, would be included in the 2016 Second report. My delegation believes these issues should be examined by realigning them into the two areas of "prevention" and "punishment."

My delegation would like to once again thank Special Rapporteur Professor Sean Murphy and the ILC for their excellent work.

Now my delegation would like to make some comments on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. We express our sincere appreciation to the Special Rapporteur, Mr. Georg Nolte, on his third report.

Given the practical difficulties in applying Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, the work is expected to provide States with indispensable guidelines on the interpretation of treaties by identifying and clarifying the scope and the roles of various subsequent agreements and practices related to the interpretation of treaties.

Regarding the provisionally adopted draft conclusion 11, my delegation would like to stress the following points. While constituent instruments of international organizations are multilateral treaties to which the 1969 Vienna Convention on the Law of Treaties applies, these instruments need particular consideration due to the fact that they have the purpose of establishing a subject of international law. These considerations are provided for in Article 5 of the Vienna Convention and this article could serve as the starting point for dealing with subsequent agreements or subsequent practice in the interpretation of constituent instruments of international organizations.

Concerning the international organizations, my delegation would like to draw your attention to the fact that the three current topics of the ILC simultaneously touch upon the role of international organizations in the application and the creation of international law: namely draft conclusions 10 and 11 of 'subsequent agreement and subsequent practice in relation to the interpretation of treaties', draft conclusions 4 and 12 of 'identification of customary international law' and draft

article 8 of 'protection of persons in event of disasters'.

My delegation also takes note that the role of 'intergovernmental conference or COPs' and 'non-State actors' in the field of application and formation of international law is dealt with in the above mentioned three topics. As such, the ILC is advised to ensure that the final outcomes of these three topics concerning the role of international organizations, intergovernmental conferences and non-State actors maintain the logical coherence and the balance between *lex lata* and *lex ferenda*.

Draft conclusion 11(2) explains that subsequent agreements and subsequent practice under Articles 31(3) or 32 of the Vienna Convention can be used as means of interpretation of the constituent instruments of international organizations. The ILC pointed out that it would not be easy to identify whether States meeting at a plenary organ of an international organization are acting as members of this organ or act as States parties to constituent instruments of these organizations. Such identification is important in order to determine whether such acts are acts of the plenary organ or acts of States parties. The identification is not always simple. In our opinion, the most important factor is the intention of the States concerned. In order to discover such intentions, a comprehensive examination is needed. Indeed, as the ILC explained, the contents of the decision of the organ of the international organization, as well as circumstances in which this decision was adopted, are crucial for identifying States' intentions.

Draft conclusion 11(3) deals with an international organization's own practices. My delegation agrees with the ILC that such practices as a means of interpretation of the constituent instruments of international organizations should be evaluated on a case-by-case basis.

Draft conclusion 11(4) affirms the contents of Article 5 of the Vienna Convention. Draft conclusion 11(4) recognizes that more detailed "relevant rules" of interpretation included in a constituent instrument of an international organization can prevail over the general rules of the Vienna Convention. My delegation regards such a statement as reflecting a particular characteristic of constituent instruments of international organizations.

Lastly, concerning the future ILC work plan, the Korean Government looks forward to the Special Rapporteur's fourth report at the next session of the Commission, and we hope for continued in-depth and effective discussions of the ILC.

Thank you very much for your kind attention.