



# PHILIPPINES

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## **STATEMENT**

Permanent Mission of the Republic of the Philippines to the United Nations

### **Agenda Item 79: Report of the International Law Commission on the work of its seventy-fifth session**

Cluster I – Chapters I, II, III, VII: (Immunity of State officials from foreign criminal jurisdiction), X  
(Sea-level rise in relation to international law) and XI (Other Decisions and Conclusions)  
23 October 2024

79th Session of the United Nations General Assembly

Mr. Chair,

The Philippines commends the International Law Commission (ILC) for its work at the 75<sup>th</sup> session and thanks the Chair Marcelo Vázquez-Bermúdez for the substantive presentation to the Sixth Committee. We note that the ILC has remained productive, despite the reduction of the duration of their session due to the liquidity crisis.

As the ILC marks its 75<sup>th</sup> year, we recognize its effective discharge of its mandate and its continuing contribution to the codification and progressive development of international law. We hope that adequate resources will be provided to the ILC, bearing in mind the importance of their enhanced engagement with Member States, including here in New York.

With respect to the latest report, we wish to share the following preliminary general observations on the chapters on “Immunity of State officials from foreign criminal jurisdiction” and “sea-level rise in relation to international law” and “Other decisions and conclusions of the Commission.”

### **On “Immunity of State officials from foreign criminal jurisdiction”**

The Philippines thanks Special Rapporteur Claudio Grossman Guiloff for his report as well as the Commission for the progress on this topic, including their close examination of the submissions of states. We recognize the work of the previous rapporteurs who have paved the way for the ILC’s adoption of the set of draft articles which is going through its second reading.

On draft Article 7 on the exceptions from immunity *rationae materiae*, the Philippines wishes to share its state practice. Under the ‘Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity,’ the Philippine has legal and policy framework that reaffirms some principles of criminal liability.

Thus, under Section 9 of said law, it applies equally to all persons without any distinction

based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under law, nor shall it, in and of itself, constitute a ground for reduction of sentence. However:

(a) Immunities or special procedural rules that may be attached to the official capacity of a person under Philippine law other than the established constitutional immunity from suit of the Philippine President during his/her tenure, shall not bar the court from exercising jurisdiction over such a person; and

(b) Immunities that may be attached to the official capacity of a person under international law may limit the application of this Act, but only within the bounds established under international law

Further, I wish to draw attention to recent Philippine jurisprudence related to state immunity.

*CNMEG v. Santamaria G.R. No. 185572. February 7, 2012*

The Philippines' subscribes to the Restrictive Theory in applying State Immunity. In this case, the Court ruled that even if a foreign corporation was exercising governmental functions, that was not enough to vest it with immunity. Even entities performing governmental tasks can be sued if they act like private businesses, or if the action is in pursuit of a purely commercial activity.

The application of the doctrine of immunity from suit has been restricted to sovereign or governmental activities (*jure imperii*). The mantle of state immunity cannot be extended to commercial, private and proprietary acts (*jure gestionis*).

This case concerned an Agreement was entered into by the North Luzon Railways Corporation (Northrail) and China National Machinery and Equipment Corporation Group (CNMEG) for the construction of the North Luzon Railway System in the Philippines. Respondents in the case claim that the Contract Agreement must be nullified for being contrary to the Constitution and several other statutes. Meanwhile, CNMEG asserts that the courts have no jurisdiction over it and the subject matter since as an agent of the Chinese Government, CNMEG was immune from suit. The Court ruled that CNMEG was not immune from suit because it is engaged in a proprietary function.

*Arigo v. Swift, G.R. No. 206510, September 16, 2014*

This case also echoes the same restrictive theory: when the acts giving rise to a suit are those of a foreign government done by its foreign agent, although not necessarily a diplomatic personage, but acting in his official capacity, the complaint could be barred by the immunity of the foreign sovereign from suit without its consent; and treats illegal acts and *ultra vires* acts as outside the scope of state immunity.

This may be of note in relation to comments during the summary debate that there is little evidence in practice to support the conclusion that official conduct must be lawful to enjoy

immunity. Citing an earlier case, the Supreme Court ruled that “Inasmuch as the State authorizes only legal acts by its officers, unauthorized acts of government officials or officers are not acts of the State, and an action against the officials or officers by one whose rights have been invaded or violated by such acts, for the protection of his rights, is not a suit against the State within the rule of immunity of the State from suit.

In the same tenor, it has been said that an action at law or suit in equity against a State officer or the director of a State department on the ground that, while claiming to act for the State, he violates or invades the personal and property rights of the plaintiff, under an unconstitutional act or under an assumption of authority which he does not have, is not a suit against the State within the constitutional provision that the State may not be sued without its consent.” The rationale for this ruling is that the doctrine of state immunity cannot be used as an instrument for perpetrating an injustice.”

We appreciate the ILC’s focus on the first six draft articles and its careful consideration of the state practice as it moves forward with the draft articles. We would like clearer indication of what constitutes *lex lata* and *lex ferenda* in the subsequent reports on the draft articles.

### **On “Sea-level rise in relation to international law”**

We would like to express appreciation to the Co-Chairs of the Study Group on their work. We thank the Co-Chairs, Prof. Patricia Galvao-Teles and Mr. Ruda Santolaria for the additional paper to the second issues paper on the question of statehood and sea level rise.

As an archipelagic state situated in the Asia-Pacific region, the Philippines is vulnerable to sea-level rise. Over half of people and its cities and municipalities are located in the coastal zone. Over 150,000 Filipinos may face permanent displacement due to sea-level rise in less than twenty years. The rate of sea level rise is likely to double by 2060.

Sea level rise is a direct consequence of climate change. We reiterate our general views on the impacts of sea-level rise on international law: including on the UN Convention on the Law of the Sea, statehood, and the protection of persons - these questions must be approached on the basis of legal stability, security, certainty, and predictability in international law.

On sea level rise and the law of the sea regime – including its impacts on baselines, maritime zones, and offshore features, the Convention sets out the legal framework within which all activities in the ocean and seas must be carried out. The integrity and stability of the Convention are important, given its historic significance and contribution to the maintenance of peace, justice and progress for all peoples of the world.

On statehood, it is crucial to safeguard sovereignty and statehood of states affected by sea-level rise. International law does not contemplate the demise of statehood due to climate change. There must be a presumption, if a not a principle, in favor of the continued existence of statehood, and we must undertake earnest efforts to ascertain the legal basis for this.

On the protection of persons from the impacts of sea-level rise. This is the so-called ‘human face’ of sea level rise, as noted by Professor Galvao-Teles – and the protection of persons should remain at the center of our efforts.

Existing international legal frameworks potentially applicable to the protection of persons affected by sea-level rise are fragmented and general in nature. The existing framework could be complemented and further developed to address the long-term consequences of sea-level rise.

We need to identify synergies and identify opportunities for developing norms and frameworks, such as one on the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters or PPED.

Sea-level rise is a slow-onset disaster which requires the protection of persons under a robust legal framework. Member States could build upon the Draft Articles should they decide to negotiate a treaty on its basis in a diplomatic conference. Other prospects are the ongoing proceedings before international and regional tribunals related to climate change, which we must bear in mind.

As an archipelagic state highly vulnerable to sea-level rise and its effects, we continue to follow closely the work of the Commission on sea-level rise in relation to international law. We intend to revisit these general observations in relation to the Commission's work. We look forward to final report on this topic.

#### **On "Other decisions and conclusions of the Commission"**

We welcome the introduction of new topics in the long-term programme of work of the ILC – **compensation for damages caused by internationally wrongful acts** and **due diligence in international law**. We look forward to closer engagement with the ILC on these topics, moving forward.

Thank you, Mr. Chair. **END**