

Statement by Ms. LEE Young Ju
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Report of the International Legal Commission on the work of its 75th
session (Agenda 79) Cluster 1
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Cluster 1

Immunity of State officials from foreign criminal jurisdiction

Mr. Chair,

My delegation wishes to convey its sincere appreciation to Special Rapporteur, Mr. Claudio Grossman Guiloff and all ILC members for their outstanding work on this topic, which is of significant importance to the international community. In the light of the complexity and sensitivity of the issue, and the imperative of fighting impunity, the Special Rapporteur's decision to conduct the second reading for two years instead of one year, is to be welcomed. My delegation would like to make some general comments on the work of the Commission and then proceed to offer specific comments on draft articles.

First, concerning the nature and purpose of the second reading exercise, the Commission may want to take a more substantive approach to the issue in the light of considerable state practice relating to the topic. For example, a more detailed discussion of the 2020 *Enrica Lexie* arbitral award¹ would shed more light on the topic, particularly on the question of immunity *ratione materiae*. It is also to be noted that the draft articles which took a rather long period until its adoption of first reading appear to contain some inconsistencies, including the commentaries, which need to be addressed.

Secondly, even though the draft articles purport to address the topic of *immunity of State officials from foreign criminal jurisdiction*, there are instances of syncretic conflation of immunity from civil jurisdiction and immunity from criminal jurisdiction. For instance, many judicial decisions cited in the commentaries to the draft articles adopted on first reading address, not immunity from criminal jurisdiction, but immunity from civil jurisdiction. Mixing the two different régimes of immunity can negatively impact the work on this sensitive topic.

Thirdly, in connection with this topic, one cannot overemphasize the importance of collating the relevant State practice and incorporating it into the Commission's work. We believe that the Commission's work is to be based on "sufficiently widespread and representative" State

¹ PCA, *The "Enrica Lexie" Incident (Italy v. India)*, Award (21 May 2020). The question of immunity *ratione materiae* is discussed in paras. 812-874.

practice. For this purpose, the Commission is invited to collect the relevant State practice in a geographically balanced manner in the remaining period of its work on the topic.

Now let me make brief comments on draft Articles.

In connection with draft Article 2 and the other draft articles relating to immunity *ratione materiae*, it would be advisable for the Commission to include a reference to *ultra vires* acts in the commentary to draft Article 2, specifically under paragraph (b), which concerns acts performed in an official capacity, would help clarify the concept further. This would offer more precision regarding the criteria for immunity *ratione materiae* as outlined in draft Article 5.

In the light of overlap between draft Article 5 (as adopted on first reading) and draft Articles 2 and 6, my delegation could align itself with the Drafting Committee's decision to delete the former. However, draft Article 5 serves the function of declaring the existence of a rule of immunity *ratione materiae*, therefore, my delegation is open to the option of retaining the provision, subject to the streamlining of other relevant provisions.

Concerning draft Article 7 which the Commission did not discuss this year, my delegation would like to invite the Commission to consider it carefully and meticulously next year in the light of relevant State practice, given that the provision was provisionally adopted in 2017 through a vote and further given that States have submitted a wide range of views on this issue through written comments on the draft Articles adopted on first reading.

Hoping that the Commission will continue to make progress in the discussion of this crucial topic, the Republic of Korea expresses its willingness to fully cooperate with the Commission.

Sea-level rise in relation to international law

Mr. Chair,

Turning to the topic of the *Sea-level rise in relation to international law*, my delegation would like to express deep gratitude for the excellent additional paper following up on the 2022 issues paper prepared by Mr. Juan José Ruda Santolaria and Madam Patrícia Galvão Teles. As the summary of the exchange of views in the ILC Report clearly shows, the Study Group carried out a most comprehensive and meticulous discussion on the important issues of *Statehood* and *the protection of persons affected by sea level rise*. The issues paper and the additional paper have clearly identified the key issues, presented a starting point for each, and proposed innovative and insightful solutions.

My delegation highly appreciates the collaborative approach taken by the Commission in the form of a Study Group that combines three sub-topics in an efficient and cohesive manner. This Study Group will serve as a template for the Commission's future work in the progressive development of international law and looks forward to the final outcome of the Study Group

to be submitted in 2025.

In connection with the issue of sea level rise, the Republic of Korea fully shares the concerns of the international community, particularly low-lying island States confronted with grave challenges posed by climate change. In this context, in May 2023, the Republic of Korea expressed its support for the 2021 Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise adopted by the Pacific Islands Forum. We are also actively participating in various collaborative projects such as C-SET (Coalition for Addressing Sea-Level Rise and its Existential Threats), and RNI (the Rising Nations Initiative) for the vulnerable Pacific Atoll countries.

The Republic of Korea also participated in the advisory proceedings before ITLOS and the ICJ. It is to be noted that the Constitutional Court of the Republic of Korea rendered a historic decision in last August that confirmed the constitutional duty of cutting down on the emission of greenhouse gases. This ruling marked the first such constitutional recognition in Asia.

As regards *the continuity of Statehood*, my delegation agrees with the view of the Study Group that while the 1933 Montevideo Convention provides for the elements required for the creation of a State, it does not regulate the issue of continuity of Statehood in the context of sea level rise. At the same time, it is also the case that the international recognition of continued Statehood arises from the consideration of the special circumstances under which the small island developing States find themselves in the specific context of sea level rise. In discussing the legal implications or consequences of continuing Statehood in the context of sea level rise, one should take into account this fact.

Concerning *the protection of persons affected by sea-level rise*, the additional paper identifies no less than 12 "possible elements for legal protection of persons affected by sea-level rise". While we fully appreciate them, we recommend further consideration of the interrelationships among the elements.

It is also suggested that the Commission's work could gain in persuasiveness and acceptance by paying more attention to the distinction between *lex lata* and *lex ferenda*, in particular by properly "situating" the "soft law instruments" in the normative context.

Other decisions and conclusions of the Commission

Mr. Chair,

On the decisions and conclusions of the Commission, the Republic of Korea expresses its sincere gratitude to all members of the Commission for their continuous efforts in advancing international law. We especially welcome the Commission's decision to include *Compensation for the damage caused by internationally wrongful acts* and *Due diligence in international law* as long-term programme of work.

Furthermore, we fully support the Commission's decision to re-establish the Planning Group under the leadership of Mr. Marcelo Vázquez-Bermúdez to review the Commission's program, procedures, and working methods. We also welcome the re-establishment of the Working Group on working methods and procedures, chaired by Mr. Charles Chernor Jalloh. These actions are vital steps toward ensuring the effective functioning of the Commission and the continued development of international law.

On the occasion of the Commission's 75th anniversary, we extend our heartfelt congratulations. The Republic of Korea remains fully committed to supporting the Commission's work and to contributing to the ongoing development of international law.

Lastly, we would like to congratulate Ms. Alina Orosan of Romania and Mr. Xinmin Ma of China on their recent elections.

Thank you. /END/