THE REPUBLIC OF KOREA

PERMANENT MISSION TO THE UNITED NATIONS

335 East 45th Street, New York, N.Y. 10017
Tel (212) 439-4000, Fax (212) 986-1083

Statement by Representative of the Republic of Korea

Sixth Committee of the 67th Session of the UN General Assembly

Agenda 79: Report of the International Law Commission on the work of its sixty-four session (Part III)

5 November 2012

New York

<Check against Delivery>

Mr. Chairman,

1. Before starting comments on the specific topics, my delegation would like to pay special tribute to Mr. Václav Mikulka for his distinguished contributions, as Secretary of the Commission, to the progressive development and the codification of international law.

Immunity of State Officials from Foreign Criminal Jurisdiction (Chapter VI)

2. In regard to the topic "*Immunity of State Officials from Foreign Criminal Jurisdiction*," my delegation would like to extend its appreciation to the ILC and Special Rapporteur, Madam Concepción Escobar Hernández, for her providing report on this topic.

3. Since the addition of the topic to the Commission's work programme at the 57th session in 2007, it has drawn considerable attention from the States. It is closely related to the major legal issues the international community currently needs to deal with, such as strengthening the rule of law and combating impunity. In this vein, my delegation would like to make some comments on the topic as follows.

4. First, we believe, as the Special Rapporteur mentioned, the harmonization between *lex lata* and *lex ferenda* is crucial in addressing this topic. In view of the "progressive development of international law and its codification," we also believe that a deductive approach to this topic would be more effective than an inductive one, and that it is desirable for the ILC to

identify and develop the relevant rules on the basis of State practice, and national and international jurisprudence.

5. Second, according to the previous Special Rapporteur's report, there exists a difference between immunity *ratione personae* and immunity *ratione materiae* in terms of their legal repercussions for the subject of immunity, the necessity for invoking immunity, and the waiver of immunity. Nevertheless, it would still be difficult to clearly distinguish between the beneficiaries of immunity *ratione personae* and those of *ratione materiae*. Moreover, identifying the scope of "certain other incumbent high-ranking officials" as the beneficiaries of immunity *ratione personae* may make it difficult to determine exactly who are qualified for the immunity, rather than in the case of simply confining the beneficiaries to the "*troika*."

6. With regard to the question of who the beneficiaries of immunity *ratione personae* are, the diversity in the political systems of various States makes it difficult to add "other high-ranking officials" to the applicable scope of persons under the immunity *ratione personae*, besides the "*troika*" (the Head of State, the Head of Government, and the Minister for Foreign Affairs). Therefore, clear criteria or guidelines on this issue are required for identifying "other high ranking officials." In this regard, we note that the ICJ's Judgment in 2002 in *the Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, which deals with "*the effective performance...on behalf of their respective States*" may provide a clue to this issue.

7. Concerning immunity *ratione materiae*, defining "an official act" is important. Various criteria should be considered for defining the concept. First of all, as the Special Rapporteur proposed, it is necessary to consider the relationship between the rules on attribution for State responsibility and the immunity of State officials in determining whether a State official was acting within an official capacity. An in-depth review of the well-established distinction between *acta jure imperii* and *acta jure gestionis* in the law of State immunity will also be helpful in establishing the list of official acts.

8. In order to discuss the scope of exceptions to the immunity of a State official from foreign criminal jurisdiction, the priority of the work should be placed on identifying current law by collecting and analyzing the relevant State practices and national and international jurisprudence. If the existing law cannot be clearly identified, then it would be required to discuss whether it is necessary to recognize any limitations on the immunity in cases of violations of *jus cogens* or commissions of international crimes in the interest of protecting human rights or combating impunity. States as well as the members of the Commission have disagreement over the issues of the necessity of exceptions or, if any, the extent of their scope. Considering the disparities in the positions of various States, we request the Commission to take a cautious approach on this issue. My delegation believes that the ILC will make substantial contributions to this issue to the extent that States could reach reasonable consensus on it.

9. My delegation supports the Special Rapporteur's proposal of analysing one block of the basic four questions at one time, and hopes that the Commission considers all such relevant materials as the previous reports, the memorandum of the Secretariat, and the progress in the debates of the Commission and the Sixth Committee.

Provisional Application of Treaties (Chapter VII)

10. On the issue of the "*Provisional Application of Treaties*," my delegation congratulates the appointment of Mr. Gómez-Robledo as Special Rapporteur, and we hope that he plays an active role in the future works of the ILC. Considering the importance of this topic, my delegation believes that it is reasonable to discuss on it in terms of elaborating the *1969 Vienna Convention on the Law of Treaties*. In this regard, we would like to give the following suggestions.

11. First of all, we consider it is necessary to clarify the meaning of "provisional application" in Article 25 of the Convention. If it means that a treaty enters into force provisionally without the consent of the State to be bound, it should be considered how the provisional application regime could be in harmonization with the current international rules based on the consent of the State to be bound.

12. It is also necessary to review State practice on how a person is empowered to represent a State for the purpose of expressing the consent of the State to be bound "before its entry into force," as well as the related articles of the Convention, namely, Articles 7 (*Full powers*), Article 8 (*Subsequent confirmation of an act performed without authorization*), Article 46 (*Provisions of internal law regarding competence to conclude treaties*), and Article 47 (*Specific restrictions on authority to express the consent of a State*).

13. We would like to mention an example concerning this topic. For the provisional application of the Free Trade Agreement between the Republic of Korea and the EU, the consent of the National Assembly of Korea was required, as in case of its entry into force. Since the agreement was provisionally applied with the consent of the Assembly, additional measures have not been taken for its entry into force.

14. In regard to the issue of the relationship between Article 25 and Article 18 (*Obligation not to defeat the object and purpose of a treaty prior to its entry into force*) of the Convention, my delegation would like to point out that the two articles apply to a treaty as the separate regimes before its entry into force. That is, the obligation not to defeat the object and purpose of a treaty prior to its entry into force (Article 18) could be applied irrespective of the provisional application of the treaty. In this context, if the treaty itself provides a clause on provisional application, such a provision will be protected by Article 18 of the 1969 Vienna Convention as well.

Formation and Evidence of Customary International Law (Chapter VIII)

15. With regard to the topic "*Formation and Evidence of Customary International Law,*" my delegation congratulates that Michael Wood was appointed as a Special Rapporteur this year. Considering that the role of customary international law in the twenty-first century is still significant in the international legal system, this topic is quite important and necessary. In this regard, my delegation believes that it is appropriate to request the Secretariat to prepare a memorandum on this issue, which will identify the elements in the previous works of the Commission.

16. On the issue of the form of the final outcome of the Commission's works, as the Special Rapporteur mentioned in his Note, my delegation agrees that it should be a set of conclusions with commentaries, which would help people with no international legal expertise identify whether a particular rule constitutes a norm of customary international law. In addition, my delegation would like to propose that the content of the outcome should be clear, concise, and comprehensible as possible.

17. In regard to the content, as the Special Rapporteur mentioned, we note that the patterns of development and formation of customary international law is diverse in each area of international law as well as in State practice. Consequently, it should be decided on in advance whether the Commission would find out any uniformity in the process of formation and evidence of customary international law throughout the international legal system. Furthermore, how to collect various State practice and evaluate them will be also considered.

The Obligation to Extradite or Prosecute (Chapter IX)

18. With respect to the topic "*Obligation to Extradite or Prosecute,*" we would like to appreciate the contributions made by the chairman of the Working Group, Mr. Kittichaisaree. My delegation has been interested in this topic because of its potential contribution to strengthening the rule of law as well as combating impunity in the international community. Considering the results of discussions in the ILC for years, however, it is probably time to reconsider whether this topic is relevant to the ILC's mission: the codification and progressive development of international law. Nevertheless, my delegation would like to comment on its substantial aspects.

19. My delegation considers that it is not effective to harmonize every clause on the obligation to extradite or prosecute in various multilateral treaties because of the existing doubt on whether there is any uniform and consistent State practice in such obligation, despite the existence of the Hague formula in the treaties related to aviation crimes. Furthermore, my delegation believes that focusing on how a particular extradition/prosecution provision is interpreted, applied, and implemented would not be the proper subject matter of the ILC works unless it could provide some general principles in international law.

20. In addition, with regard to a proposal to focus on the extradition/prosecution of the core crimes among various international crimes, my delegation believes that such work would be redundant as Article 9 of the "*Draft Code of Crimes against the Peace and Security of Mankind* (1996)" already dealt with the same subject matter.

21. An analysis on the C*ase between Belgium and Senegal (2012)* will be particularly relevant to this topic, because one of the core issues in the case was the State's compliance with the treaty obligation or customary law obligation to extradite or prosecute. Even though the Court opinion was not quite clear on whether there exists any customary law obligation to extradite or prosecute as a matter of general international law, it is worth noting that some judges of the Court expressed negative opinion on the existence of such customary law obligation.

22. We note there has been a controversy on the feasibility of the topic. My delegation does not deny the importance of such discussion. Considering the recent discussions on this topic during ~~in~~ the ILC sessions, however, we have reservation about further consideration of the feasibility issue.

Study Group's topics (Chapter X)

23. Just briefly, about the "*Treaties over Time*", my delegation appreciates the efforts made by Mr. Georg Nolte for the issue and supports the ILC's decision to appoint him as Special Rapporteur for the issue of the "*Subsequent agreement and subsequent practice in relation to the interpretation of treaties.*" Considering his contributions to the development of international law, he deserves to assume the important task for clarifying the legal significance of Article 31 of the *Vienna Convention on the Law of Treaties.*

24. At this moment, my delegation would like to reserve comments on six preliminary conclusions drawn by the Study Group because it seems still premature to discuss about them.

25. In conclusion, my delegation would like to thank the ongoing efforts of the ILC members and Special Rapporteurs and anticipate fruitful outcomes on these topics. My delegation believes that discussions at the Sixth Committee and the Commission will make significant contributions to the development of international law.

Thank you for your attention.

/END/