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Ministry of Foreign Affairs of the Republic of Korea

Report of the International Legal Commission on the work of its 76th session (Agenda 80)

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Cluster 2

Immunity of State Officials from foreign criminal jurisdiction

My delegation would like to express its gratitude for the excellent work done by the Special Rapporteur, Mr. Claudio Grossman Guiloff, and the ILC members on this topic, which carries crucial importance for the international community. It was regrettable that, due to the reduced length of the session of the ILC, the Commission was not able to complete the second reading at the session as originally planned. My delegation hopes that the Commission will be able to successfully conclude this highly complex and sensitive topic, striking a proper balance between the principle of sovereign equality, on the one hand, and the imperative of preventing impunity for those who commit crimes under international law, on the other.

At the present session, the Commission considered the second report of the Special Rapporteur as well as comments and observations received from States. The second report contains draft articles 7 to 18. Draft article 7 addresses the crucial question of “exceptions to immunity *ratione materiae*.”

My delegation will first address the question of whether or not to retain draft article 7. Secondly, what Mr. Grossman calls “a central issue”, that is, “which crimes ought to be listed” in draft article 7, will be considered. Thirdly, general comments will be made on Part 4, providing for procedural guarantees and safeguards.

Concerning the first question, that is, whether to retain draft article 7 or not, my delegation would like to align itself with the Special Rapporteur and most members of the Commission in the view that draft article 7 should be retained. The reasons are as follows. First of all, the deletion of draft article 7 would risk eroding one of the most significant of the post-1945 achievements in international law. The acceptance of crimes under international law and the accompanying recognition of individual criminal responsibility directly under international law was a belated, but

inevitable normative response to those crimes “shocking the conscience of humanity”.

Secondly, in considering whether to retain draft article 7, it is imperative for the Commission to maintain consistency with its own work on the same question. In this connection, one needs to refer to the 1996 Draft Code of Crimes against the Peace and Security of Mankind. The final version of the draft code, as completed in 1996, provides a list of 5 crimes *jure gentium*, that is, what is often known as the four “core crimes” *plus* “crimes against the United Nations and associated personnel” (draft article 19). Regarding these crimes, the Commission, in its commentary on draft article 8 (“Establishment of jurisdiction”), provides for universal jurisdiction to be exercised by national courts. In particular, concerning the crime of genocide, the Commission refers to “the character of the crime of genocide as a crime under international law, for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention”.

Thirdly, the emerging trend in State practice concerning this question, as demonstrated in considerable detail in the second report of the Special Rapporteur, also supports the retention of draft article 7. The Republic of Korea is no exception to this trend and has promulgated an Act on Punishment of Crimes under Jurisdiction of the International Criminal Court, providing for universal jurisdiction to be exercised by the domestic courts of Korea.

Now that the notion of exception to immunity *ratione materiae* is recognized, the next question is how to delineate the boundary of those crimes amenable to the exception. The difficulty of this question is amply demonstrated by the widely diverging views on the conceptual limit of crimes under international law.

It is to be noted that some States have pointed out the lack of “clear criteria for the selection of the crimes listed in the draft article.” The importance of this question increases even more because the Special Rapporteur, in his second report, proposes that the crimes of aggression, slavery, and slave-trading be added to the existing list. In this connection, it is essential for the Commission to be transparent and clear about the criteria for the choice of crimes *jure gentium* to be included in draft article 7.

In this regard, it is submitted that, at the present stage of development of international law and further given the Commission’s own position on this question in the recent past, the Commission needs to consider carefully whether the ILC has provided convincing reasons for the addition of the crime of aggression to the list of draft article 7. It was just 3 years ago that the Commission decided not to include the crime of aggression in the list of draft article 7, citing the

implications of the exercise of national jurisdiction “for the international relations and international peace and security”.

The unique character of the crime of aggression is also confirmed by the ILC’s work on the 1996 Draft Code of Crimes against the Peace and Security of Mankind. Under Article 8 of the Draft Code, while the other 4 crimes fall under the concurrent jurisdiction of national courts and the International Criminal Court, the crime of aggression is to be referred to the exclusive jurisdiction of the International Criminal Court to be established.

Once again, my delegation reiterates its firm conviction that the crime of aggression is the supreme international crime and would welcome the eventual inclusion of the crime in the list of draft article 7. However, for the reasons stated above, we would like to invite the Commission, first, to clearly articulate the criteria for the list of draft article 7, and, secondly, to provide convincing rationales for a substantial change in its position, unambiguously adopted only 3 years ago.

The Commission decided to provide for Part 4 for the purpose of “avoiding possible abuse or politicization of the exercise of criminal jurisdiction by one State over an official of another State”. In this sense, Part 4 constitutes an essential component of the draft articles that stands in a relationship of complementarity with other parts of the draft articles, in particular, Part 2 and Part 3.

It is for this reason that my delegation believes that the same normative character should be given to both the substantive and procedural parts of the draft articles. To formulate Part 4 in the form of “guidelines” or “recommendations”, as some States suggest, would risk weakening the effectiveness of the procedural safeguards provided for in Part 4, thereby working as a hurdle to a wider acceptance of the draft articles. Having said that, it would be advisable for the Commission to address the concerns raised by some States about the relative lack of State practice in support of the provisions contained in Part 4, in addition to ensuring the consistency of those provisions with the relevant ICJ jurisprudence.

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.

Subsidiary means for the determination of rules of international law

My delegation would like to express its gratitude for the Special Rapporteur's excellent Third Report and for the work of the Commission on this topic under very challenging circumstances due to the significant shortening of this year's ILC session. It is hoped that the Commission will bring this topic to a successful completion, which constitutes the last, but not the least, component of Article 38(1) of the ICJ Statute.

First, my delegation would like to express reservations about the Special Rapporteur's overly broad view of the boundary of the subsidiary means. Despite the 'malleability and flexibility' inherent in Article 38(1) of the ICJ Statute, it would be questionable to try to turn Article 38(1)(d) into a kind of catch-all category that can subsume most of the post-1920 candidates for the "sources" of international law within its remit. The boundary of Article 38(1)(d) appears to have been substantially expanded under the draft conclusions proposed by the Special Rapporteur, particularly as compared to the purview of the mandate as indicated in the syllabus of this topic.

Secondly, my delegation would like to express reservations about draft conclusion 12. In his Third Report, the Special Rapporteur, in paragraph 214, refers to "the role of the subsidiary means in promoting greater coherence of international law" and carries out a very lengthy and detailed discussion on the "question of unity and coherence of international law" from page 49 to page 72. It is to be remembered that the important question of "unity and coherence of international law" was already addressed by the ILC Study Group on "Fragmentation of international law". It is open to question whether the "question of unity and coherence of international law" falls properly within the function of the subsidiary means.

Thirdly, the Special Rapporteur in his Fourth Report devotes the longest discussion to the question of the relationship between "subsidiary means" for determining rules of law and "supplementary means" of interpretation. However, my delegation has strong reservations about the Special Rapporteur's view. Despite the outward appearance, the intention of the drafters of the Vienna Convention on the Law of Treaties regarding the conceptual boundary of "supplementary means for interpretation" under Article 32 of the VCLT was very limited — in particular, to preparatory work, that is, the *travaux préparatoires*. This view is supported by the leading academic literature on the topic. Apart from its academic value, it is not entirely clear how this discussion may contribute to understanding or developing the main topic of the Report. Therefore, the Commission is invited to seriously consider whether to retain draft conclusion 13.

Finally, my delegation would like to stress the need to refine the clear-cut dichotomy between private and public as it appears in draft conclusions 9 and 10.

Hoping that the Commission will continue to make its important contribution to the discussion of this topic, the Republic of Korea will keep participating in the consideration of the topic actively and fully cooperate with the Commission.

I thank you.