

Comments and Observations on the ILC's Draft Articles on "Immunity of State Officials from Foreign Criminal Jurisdiction."

Republic of Korea

1. General Comments and Observations

The Republic of Korea welcomes the adoption, on first reading, of the draft articles and a draft annex on "Immunity of State Officials from Foreign Criminal Jurisdiction." The Republic of Korea extends its deep gratitude to Special Rapporteurs Mr. Roman A. Kolodkin and Ms. Concepción Escobar Hernández for their dedication and important contribution to the work on this topic.

In response to the Commission's request, the Republic of Korea provides the following comments and observations.

2. Specific Comments on the Draft Articles

(a) Draft Article 7 - Crimes under international law in respect of which immunity *ratione materiae* shall not apply

The Republic of Korea notes that the Commission provisionally adopted Draft Article 7 by the recorded vote in 2017 and observes that States are expressing a variety of reasons for disagreement with this Article. The Republic of Korea strongly supports the need to address impunity for serious international crimes. However, the Republic of Korea emphasizes that the exceptions enumerated in this Article must be carefully considered based on an accurate analysis of State practice and international jurisprudence.

To contribute to the fight against impunity for the most serious international crimes, the Republic of Korea enacted the *Act on Punishment of Crimes under the Jurisdiction of the International Criminal Court*¹ in 2007. The purpose of the Act is to punish crimes within the jurisdiction of the International Criminal Court and to establish procedures for cooperation

¹ https://elaw.klri.re.kr/kor_service/lawView.do?hseq=24229&lang=ENG.

between the Republic of Korea and the International Criminal Court pursuant to the Rome Statute. However, there has not yet been a case where a Korean court has applied this Act.

(b) Draft Article 9 - Examination of immunity by the forum State, and Draft Article 10 - Notification to the State of the official

The Republic of Korea underscores the need for the Commission's work on this topic to be based on existing State practices. In this regard, the use of general terms, rather than legal terminology specific to certain jurisdictions, is commendable given States' different legal systems. Terms such as "initiating/initiate criminal proceedings" and "coercive measures" in Draft Articles 9 and 10 are apt examples of this and well-explained in the commentary.

The Republic of Korea concurs with the Commission's fundamental premise that reviewing immunity without delay prior to the initiation of criminal proceedings is important. However, the phrase "including those that may affect any inviolability that the official may enjoy under international law" in paragraph 2(b) of Draft Article 9 requires further deliberation and explanation. This need arises because the scope of exemptions under international law remains unclear, especially considering the controversy surrounding the exceptions to immunity *ratione materiae* set out in Draft Article 7.

The Republic of Korea takes note that communication between the forum State and the State of the official concerning immunity is important for the effective implementation of procedural provisions. Given this, the Republic of Korea agrees with the commentary, which views notification to be a procedural safeguard, and welcomes the adoption of Draft Article 10, which uses non-prescriptive wording on the notification measures, and is not limited to diplomatic channels.

(c) Draft Article 18 - Settlement of disputes

The Republic of Korea believes a cautious approach is necessary regarding the wording of paragraph 2 of Draft Article 18, considering the principle of consent to juridical settlement, which is explained as a corollary of State sovereignty. From this perspective, the Republic of Korea suggests that the Committee consider amending paragraph 2 to list a number of possible dispute resolution procedures, allowing the parties to choose one of them

at their discretion on a case-by-case basis, conditioned on mutual consent. The Republic of Korea anticipates that this approach could lead to a wider approval of Draft Article 18, and possibly of the entire text of the draft articles. /END/