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Statement by the Principle Legal Adviser of the Ministry of Foreign Affairs
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(check against delivery)

Mr. Chairman,

Brazil aligns itself with the statement delivered by the El Salvador on behalf of the Community of Latin American and Caribbean States (CELAC). I will now deliver some remarks from a national perspective.

Allow me to take this opportunity to thank the members of the International Law Commission for their contribution to the codification and progressive development of International Law, as well as for the report on its 69th Session.

Before addressing the first cluster of the report, Brazil wishes to join many previous speakers in welcoming the Commission's decision to hold its 70th Session both in New York and in Geneva. as stressed by CELAC, the active participation of Member States is crucial to the work of the ILC. This measure will contribute to the early engagement of delegates to the Sixth Committee. We are convinced that the impact of holding sessions in the UN Headquarters will encourage us to envisage this approach not only in the context of anniversary celebrations or of the beginning of a quinquennium.

Mr. Chairman,

Brazil welcomes the work undertaken by the Commission regarding the topic "**crimes against humanity**" and the adoption, on first reading, of a draft preamble, fifteen draft articles and a draft annex, as well as commentaries. The successful conclusion of the first reading marked a significant step towards a future convention. Such an instrument would be beneficial not only for promoting the harmonization of national legislation, but also for facilitating much-needed judicial cooperation in this realm. Brazil looks forward to submitting its full comments and observations in writing. At this stage, I just wish to make a comment on extradition - specifically on Article 13, paragraph 6. When establishing conditions for extradition, national legislations may require the commutation of certain penalties, especially the death penalty or life imprisonment. Brazil would welcome if the Commission exemplified, at least in the commentaries, different types of condition in national legislations that do not necessarily imply the refusal of an extradition request.

Mr. Chairman,

I now turn to the topic "**provisional application of treaties**". In its commentary to Guideline 3, the Commission claims to have identified practice in the sense that negotiating States or non-negotiating States that subsequently acceded to the treaty can agree to provisionally apply it. By distancing itself from Article 25 of the Vienna Convention on the Law of Treaties – that explicitly mentions “the negotiating states” – the Commission navigates uncharted waters. It is questionable whether the current state of practice is relevant enough to allow for the creation of a new rule of international law. Our main concern is not that non-negotiating States may agree in the provisional application of a treaty. What seems problematic is to admit that there could be a treaty in which some parties agree to provisionally apply it, while others do not. By mentioning "the" negotiating states, the logic behind the Vienna Convention is that we cannot achieve an agreement on what relates the provisional application of a treaties unless all States involved in the creation of that treaty agree to do so. If the unanimity system is discarded, it would be made possible that, in multilateral treaties with a high number of parties, a group of States decide, without the consent of all others, to apply it provisionally. Such situation would be made possible due to the reference, in several of the Guidelines, to the expression “other States or International Organizations concerned”, where “other” and “concerned” are not equated to “all”.

What remains unclear is that, if not every State in a treaty needs to agree on the possibility of its provisional application, to whom is the acceptance “by the other States or international organizations concerned” provided in Guideline 4 (b) directed? The commentary to this Guideline states that such acceptance is opposed to mere non-objection. But if silence is not the standard criteria for acceptance and if acceptance needs to be expressed, normally in written form, and if unanimity is not necessary for admitting the possibility of provisional application, which States or international organizations would have to make such an acceptance?

From Guideline 6, at least one relevant issue emerges. Provisional application, at least in multilateral treaties, would establish different kinds of legal relationships between the parties. Some States or international organizations would apply it provisionally in their mutual relationship, while in other cases, mutual relationships between parties will not allow for it. As a result, the same criticism towards the current regime of reservation to treaties could be applied to provisional application of treaties: flexibility may affect the integrity of the treaty.

Some speakers before me have rightly pointed out that the Guidelines seem to treat provisional application as the rule, while it should be an exception. One example of such approach is the usage of the present tense “is” (“that is provisionally applied”) in Guideline 7. In many cases, the identification of a breach to a treaty will occur only years after its provisional application and during its definite application.

Regarding Guideline 8, it is important to note that provisional application is, by its nature, provisional. Such temporary application has however undeniable legal effects. In this sense, it would be important to reflect upon what happens next to the so-called termination of provisional application. One example is the case of projects between States and international organizations developed based upon a certain treaty that was provisionally applied. Does the termination of the provisional application entail the

termination of the projects as well? It would be useful to count with a tighter discipline of the legal consequences of the termination of provisional application.

In any case, the Commission should reflect whether “termination” is the proper term to describe the cessation of effects of the provisional application. It is undeniable that there is practice supporting the use of this expression and it appears on Article 25 of the Vienna Convention; however, it is certain that such word has a long history in the law of treaties and applying it to the cessation of effects of provisional application may lead to confusion. Theoretically speaking, it would be possible that a multilateral treaty being provisionally applied by one party be terminated by another that is applying it in a definite manner. In this case, there will be a termination of one party that does not refer to the “termination of provisional application”.

The possibility of applying different forms of termination and suspension to treaties provisionally applied should be seen carefully. The risk here is developing a entire new regime for provisional application based upon something that should be considered an exception to the regular definite application of treaties.

Finally, in Guideline 11, the Commission should consider if the language of “rights of States” is the most appropriate to deal with the issue treated therein. One may question what would be the source for such right and if it has been fully recognized by the international community.

Mr. Chairman,

Before concluding, I wish to make some comments regarding the proposed **future topics** for the ILC. A decision to include "general principles of law" in the Commission's agenda would be in line with the work recently or currently undertaken regarding other sources of international law, such as "identification of customary international law" and "subsequent agreements and subsequent practice in relation to the interpretation of treaties". General principles of law have an important role in Brazilian domestic law, being applied by national judges on a regular basis. When approaching this issue, the Commission should focus on their universality - that is, should ensure that their identification is based on all legal systems of the world. It would also provide the Commission with the opportunity to clarify that the outdated word "civilized" contained in Article 38 of the ICJ Statute does not justify any hierarchy among States or legal systems in the process of identifying general principles.

Regarding "evidence before international courts and tribunals", it would be important to note that questions regarding the types and burden of proof might be solved differently according to the nature of the dispute.

I take this opportunity to stress that the General Assembly itself can also submit topics to be examined by the Commission, contributing to identify areas where useful contributions to the codification and progressive development of international law can be made. We, as General Assembly, could do better in this regard.

Thank you, Mr. Chairman.