



United Nations General Assembly | Sixth Committee

Report of the International Law Commission

(Agenda item 79)

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(check against delivery)

Mr./Madam Chair,

All protocol observed, I start my comments by directly addressing the topic of “Immunity of State officials from foreign criminal jurisdiction”.

As Brazil highlighted in its written comments to the Commission, such immunities are crucial to ensure that state officials may adequately perform their functions, to promote the peaceful settlement of international disputes, and to foster friendly relations among states. They also contribute to the stability of international relations, as they prevent the abusive, arbitrary and politically motivated exercise of criminal jurisdiction.

It is essential to retain draft article 1(3), in particular the phrase “as between the parties to those agreements”.

According to paragraph 26 of the commentaries to this article, “the intention here is to highlight that conventional legal regimes applicable to international criminal tribunals, as a matter of treaty law, apply only as between the parties to the agreement establishing a particular international criminal court or tribunal”.

It is also essential to retain this commentary to the draft article .

This phrase reflects a fundamental rule of general international law, codified in article 34 of the Vienna Convention on the Law of Treaties, stating that “a treaty does not create either obligations or rights for a third State without its consent”. This rule also governs waivers of immunities and cooperation with treaty-based criminal tribunals.

While the draft articles do not affect treaty obligations, agreements on international courts do not affect immunity of officials from non-party States. In relations between a State bound by concurring treaty and customary obligations and a State bound only to the latter, the rule by

which both States are bound governs their mutual rights and obligations.

We take note of the ongoing discussions on definitions, as per draft article 2.

Brazil generally agrees with articles 3, 4, 5 and 6 as proposed by the special rapporteur, and we reiterate that these immunities have been widely recognized in customary international law and applied by courts at both national and international levels.

According to the settled jurisprudence of the International Court of Justice, for instance, “a Head of State enjoys in particular full immunity from criminal jurisdiction and inviolability which protects him or her against any act of authority of another State”.

Turning to draft article 7, Brazil reiterates that it does not reflect customary international law. The practice related to this article is limited to a few States, and lacks broad “opinion iuris”.

In this regard, the Commission should bear in mind the need to undertake a balanced and representative analysis of State practice. It is noteworthy that there is clear imbalance in the consideration of the

practice of developed and developing states in the commentaries adopted in first reading.

Over 96% of national courts decisions referred to in the commentaries are from developed States, while less than 4% of all 101 cases mentioned are from developing countries.

Brazil urges the special rapporteur and the Commission to address this impressive shortcoming in the commentaries to be adopted in second reading.

In this endeavour, the Commission should also consider abstentionist practices, inasmuch as the deliberate decision not to act may reflect the “*opinio iuris*” of States on a certain matter.

The Commission should carefully reconsider draft article 7 in this perspective. Should it decide to retain the draft article, Brazil urges it to explicitly state in its commentaries that it does not reflect existing rules of customary international law.

On the final form of the articles, Brazil believes the Commission should recommend the elaboration of a treaty on the basis of the draft. Since some of the articles do not reflect customary law, such as draft

article 7, negotiating a treaty would allow States to express their views on them and decide whether to be bound by them in their mutual relations.

In this context, we do not favor an approach similar to the one adopted in relation to the articles on state responsibility, which, in our view, would not be inclusive or representative.

Mr./Madam Chair,

As regards chapter X of the report, on sea-level rise in relation to international law, Brazil believes that our discussions should be guided by basic principles of international law, such as sovereign equality, non-intervention, international cooperation, and human dignity.

Given the anthropogenic nature of climate change and sea-level rise, it is also important to take into account the principle of common but differentiated responsibilities, as set out in principle 7 of the Rio Declaration: “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated

responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command”.

As set out by the International Tribunal for the law of Sea in its advisory opinion on climate change and international law, CBDR is a key principle in the implementation of the UNFCCC and its Paris Agreement.

On the issue of statehood, Brazil favors the notion of continuity in the case of States whose land surface might be submerged due to sea-level rise.

While the elements set out in article 1 of the 1933 Montevideo Convention on the Rights and Duties of States are essential to the creation of States, they are not necessarily indispensable for its continued existence.

Regarding the practical alternatives considered by the Commission for addressing the phenomenon, Brazil emphasizes that they should

not create relationships of suzerainty or subservience nor establish a new form of trusteeship between formally independent States.

On the issue of protection of persons, I highlight that Brazil's migration policy is guided by principles such as humanitarian welcome, and regular entry into the country. In its implementation, Brazil issues visas with humanitarian purposes, including for persons affected by environmental disasters.

Brazil's migration legislation also aims to protect stateless persons and reduce statelessness. In this regard, we adopt an expedited naturalization process for stateless persons, which could also benefit those affected by sea-level rise.

Mr./Madam Chair,

Regarding chapter XI of the Commission's report, on other decisions and conclusions, Brazil acknowledges the recommendation to include in its long-term programme of work the topics of compensation for damage caused by internationally wrongful acts, and due diligence in international law.

We share the Commission's concern on the discontinuance of the live streaming service of the United Nations webcast of its plenary meetings.

Finally, Brazil firmly believes that convening the first part of the Commissions' seventy-seventh session in New York will strengthen dialogue between the Commission and the General Assembly and direct contact with delegates of the Sixth Committee.

I thank you.