

INTERNATIONAL LAW COMMISSION

**Immunity of State officials from foreign criminal
jurisdiction**

**Written Comments and Observations of the Federative
Republic of Brazil**

November 2023

INTRODUCTION

1. In its seventy-third session, the International Law Commission adopted, on first reading, the draft articles on immunity of State officials from foreign criminal jurisdiction, and decided, in accordance with articles 16 to 21 of its statute, to transmit it to Governments for comments and observations (A/77/10, para 66).

2. Further to the letter by the Secretary-General of the United Nations regarding the above-mentioned draft articles (LA/COD/61), Brazil has the honor to submit the following comments and observations. Brazil remains open to any further dialogue with the ILC that would assist in the completion of its work on the subject.

GENERAL REMARKS

3. Brazil commends the International Law Commission for the adoption of the draft articles on first reading and thanks the Special Rapporteur, Ms. Concepción Escobar Hernández, for her outstanding contribution to this work. Brazil also appreciates the contribution of the previous Special Rapporteur, Mr. Roman Kolodkin, for his work and commends Mr. Claudio Grossman Guiloff for his nomination as the new Special Rapporteur for the topic.

4. The immunity of State officials from foreign criminal jurisdiction is crucial to ensure the adequate performance of their functions, particularly when they are not protected by existing multilateral conventions. Such immunity is also essential to promote peaceful settlement of international disputes and friendly relations among states, including inasmuch as it allows State officials to participate in diplomatic conferences and missions in foreign countries.

5. It contributes to the stability of international relations, as it prevents the abusive, arbitrary and politically motivated exercise of criminal jurisdiction to be used against State officials.

PART I - SCOPE AND DEFINITIONS

6. Brazil welcomes the scope of the immunity of State officials from the criminal jurisdiction of another State identified in article 1 by the International Law Commission.

7. Brazil agrees that the articles shall not affect the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals. In this context, Brazil echoes the ILC commentaries to the phrase "as between the parties to those agreements" in article 1(3). Brazil reinforces that the

intention of the phrase 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" (ILC, 2022, A/77/10, p. 203, para 26).

8. It is a basic norm of general international law, codified in article 34 of the Vienna Convention on the Law of Treaties, that "a treaty does not create either obligations or rights for a third State without its consent".

9. Therefore, while the articles do not affect treaty obligations related to international tribunals, these international agreements 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.

10. In draft article 2, Brazil encourages the ILC to include a definition of foreign criminal jurisdiction that comprehends both adjudicatory and enforcement powers of States.

11. Brazil also urges the ILC to include examples of the exercise of foreign criminal jurisdiction in its commentaries. It is also essential to observe that any kind of detention or arrest by the enforcement institutions of a State necessarily entails the exercise of its own criminal jurisdiction, regardless of whether it is a provisional or definitive arrest, or whether the arrest warrant stems from a domestic criminal proceeding, or an extradition request from another state, or a request for arrest and surrender from an international criminal court.

PART II - IMMUNITY RATIONE PERSONAE

12. Brazil understands that the substantive and temporal elements in draft Articles 3 and 4, concerning the immunity *ratione personae* of Heads of State, Heads of Government and Ministers of Foreign Affairs during their respective terms in office reflect customary international law.

13. This immunity has been recognized in case law at both the national and international levels. The International Court of Justice has reiterated that "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal" [Case of the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ICJ Reports, 2002, para 51].

14. The International Court of Justice, after carefully examining State practice, including national legislations, was "unable to deduce from this practice that there

exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity" [Case of the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ICJ Reports, 2002, para 58]. The same applies to Heads of State and Government.

15. In this context, the controversial customary international law avenue adopted by the Appeals Chamber of the International Criminal Court in 2019, in the Jordan Referral re Al-Bashir Appeal seems to contradict well-established principles and rules of international law.

16. According to the settled jurisprudence of the ICJ, "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*" (emphasis added) [Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), ICJ, 2009, para 170].

17. It is important to distinguish, on one side, the domestic jurisdiction of States before which Heads of State and Government and Ministers for Foreign Affairs enjoy full immunity and, on the other side, the complementary jurisdiction of international courts, including the International Criminal Court.

18. In this regard, the ICJ has already "examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals". It found that these rules, including article 27 of the Rome Statute, "do not enable it to conclude that any such an exception exists in customary international law *in regard to national courts*" (emphasis added) [Case of the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ICJ Reports, 2002, para 58].

19. State practice is convergent in this regard.

PART II - IMMUNITY *RATIONE MATERIAE*

20. Articles 5 and 6 on immunity *ratione materiae* of State authorities also reflect customary international law. In particular, Brazil agrees that immunity *ratione materiae* with respect to acts performed in official capacity subsists after the individual has ceased to be a State official, as established in article 6(2) and in the jurisprudence of the International Court of Justice.

21. Brazil reiterates its commitment to the promotion of accountability for serious crimes under international law. For this reason, we acknowledge initiatives to avoid impunity, such as the limitations suggested in draft article 7.

22. In the view of Brazil, article 7 does not reflect customary international law.

23. In this context, if the International Law Commission decides to retain current draft article 7, Brazil urges it to explicitly observe in its commentaries that it does not reflect existing rules related to the application of the criminal jurisdiction of states or state officials that benefit from immunity.

24. Furthermore, Brazil highlights that, if States decide to adopt a legally-binding instrument based on the articles, this provision would only apply between States parties to the possible future agreement. Under no circumstance, the limitation or exception suggested in draft article 7 could apply to a non-party State to a convention based on this language.

PART IV - PROCEDURAL PROVISIONS AND SAFEGUARDS

25. Brazil commends the Commission for including safeguards in part IV of the draft articles. As reflected in article 9, it is essential that the question of immunity be examined by the forum State without delay, and necessarily before initiating criminal proceedings or taking coercive measures against an official of another State. It is also important that the "competent authorities" mentioned in article 9 are broadly understood, considering the domestic constitutional principle of the separation of powers.

26. Brazil also welcomes article 10, on the need to notify the State of the official before the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State.

27. Immunity of State officials from foreign criminal jurisdiction does not depend on invocation. A waiver of immunities of State officials may never be presumed. Brazil highlights that waivers of immunity must always be express and in writing, as set out in article 12 (2), which codifies existing customary law.

28. A waiver of immunity of State officials from foreign criminal jurisdiction may not be deduced from international treaties. The International Court of Justice has confirmed that international conventions on the prevention and punishment of serious crimes with provisions on the obligation to prosecute or extradite do not affect immunities before the forum State [Case of the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ICJ Reports, 2002, para 59].

29. Article 27 of the Rome Statute provides another clear example, inasmuch as it contains no express waiver of immunities. It is placed in Part 3 of the Statute, on general principles of criminal law, and reflects the so-called Nuremberg principles, in particular, principle III. It cannot be assumed that the absence of immunity of State officials before the International Criminal Court entails a waiver of immunity before the criminal jurisdiction of other States.

30. This is confirmed by article 98, placed in Part 9, on "International Cooperation and Judicial Assistance", aimed at precluding the ICC from requesting a cooperation incompatible with immunities of State officials vis-à-vis criminal domestic jurisdictions. According to article 98(1), the Court may only request this kind of cooperation if it can first obtain the waiver of immunity.

31. Furthermore, the Commission should include in article 12 (2) that a waiver should be "on a case-by-case basis", as it may not be presumed that a universal or unconditional waiver of immunities for all State officials can be granted through a single act of a State.

32. Brazil encourages the Commission to further consider article 12 (5), as a waiver of immunity may not be considered irrevocable. It may be revoked in some circumstances, such as when new facts not previously known come to light after the immunity has been waived.

33. Finally, it is not clear whether a dispute resolution clause would be appropriate or desirable in the outcome of the work of the Commission. If included, such a clause should be general in nature, without the use of compulsory language.