



PERMANENT MISSION OF ROMANIA  
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Sixth Committee**

*Agenda item 82*

**Report of the International Law Commission  
(72<sup>nd</sup> Session, A/76/10)**

*Chapter VI – Immunity of State officials from foreign criminal jurisdiction  
Chapter IX – Sea-level rise in relation to international law*

**Speech delivered by Mrs. Alina Orosan  
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**New York, October 2021**

*Chairperson,*

In relation to the second cluster of topics, my delegation submits the following elements for future considerations:

### ***Chapter VI - Immunity of State officials from foreign criminal jurisdiction***

We thank the Special Rapporteur (SR), Ms. Conception Escobar Hernandez, for her thorough work on what remains a very complex and sensitive subject on the agenda of the ILC. As the Special Rapporteur completed her plan of work on the topic, we express our hope that the first reading of draft articles will be accomplished during the quinquennium.

With reference to her last report, we appreciate the SR's decision to address the question of the relationship between the immunity of State officials from foreign criminal jurisdiction and the obligation to cooperate with international criminal tribunals, especially when the latter rely on States to primarily exercise their jurisdiction, by virtue of the principle of complementarity.

To us, the "without prejudice" clause is meant to clarify that the draft articles neither apply to, nor address the rules of international criminal tribunals whose autonomy is thus respected, as well as to reaffirm the scope of this exercise, namely the immunity from criminal jurisdiction of State officials and hence to safeguard both regimes.

Along the same lines, we do not interpret draft article 18 as creating a hierarchical relation in favour of the rules governing international criminal tribunals. On the contrary, if we were to follow this logic, we share the opinion that the absence of such a clause could also be misinterpreted as altering the rules governing international criminal tribunals. Moreover, draft article 18 cannot be seen as adding anything to the constituent treaties of international tribunals, in terms of rights and obligations. From this point of view, the Drafting Committee could look into proposals to further refine the text, especially if these could alleviate certain concerns existing around this draft article. In this context, we find merit in referring to "internationalized criminal tribunals" or even "relationship to specialized treaty regimes", to accommodate the existence of hybrid tribunals.

Concerning draft article 17, Romania supports the value of a provision regarding the mechanism for the peaceful settlement of disputes, as the ultimate procedural safeguard that could help resolve a controversy in this field at an early stage, following logically the draft articles on notification, exchange of information and consultations.

We reserve further our comments on these draft articles proposed by the SR pending their consideration by the Drafting Committee.

On the draft articles provisionally adopted by the Commission at this year session, we put forward the following remarks:

Generally, we find the proposed texts as providing a correct approach to the matter, in line with the relevant practice on immunity of State officials. There is, indeed, a particular need for consistency in the terminology used in the draft articles, in order to ensure a coherent approach.

*Specific comments:*

In relation to *Article 8 ante*, we do find the language contained therein as a fair attempt to ensure the applicability of all procedural safeguards to all circumstances in which a State official might face the exercise of criminal jurisdiction by a foreign State. We are encouraged by the fact that these safeguards include considerations pertinent to the determination of whether immunity applies or not in a specific circumstance, which is specifically relevant to the incidence of *ratione materiae* immunity.

Turning to *Article 8*, we are of the opinion that the question of immunity should be addressed immediately when knowledge of its incidence in the context of a criminal proceeding occurs. The authorities of the forum State should manifest increased thoroughness in the assessment of the application of immunity by seeking cooperation with the State of the official at an early stage and in a comprehensive manner. In its turn, there is an obligation of diligence on the part of the State of the official to cooperate in good faith with the forum State and act in the interest of justice.

We also share the view that the examination of the question of immunity should be addressed in *limine litis*, and in any case before any kind of measure potentially affecting the immunity and/ or the inviolability of the State official is taken.

In what *Article 10* is concerned, we agree that invocation of immunity is a right of the forum State, which should be exercised as early in the proceedings as possible. However, the non-exercise of this right as early as “when the State becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official” does not forfeit the State its right to invoke the immunity any time thereafter. In our view, this clarification is still in want in para. 1 of art. 10. This remark is without prejudice to the diligence that States should manifest in exercising this right at the earliest stage in the proceedings in the logic of acting in good faith and of not abusing of its discretion. It is also this logic that underlines the obligation of the forum State to address the issue of the immunity in *limine litis* and also seek, for the purposes of clarification of its incidence, the cooperation of the State of the official. Such a course of action is very much relevant as well for purposes of legal certainty.

We are very much in the sentiment of the Commission in what regards the text of draft Article 11 and the commentaries thereto. We are equally supporting the text of para. 5 of this draft article, as in absence of irrevocable nature of the waiver of immunity, this institution lack purpose. My delegation does not see the need either to formulate any kind of exceptions to the irrevocability of the waiver of immunity. Any of the situations mentioned as possible exceptions to the irrevocability of the waiver of immunity can be dealt with under the procedural safeguards already introduced in the relevant articles (i.e the material scope of the invocation of immunity or of the waiver of immunity).

To conclude the considerations under this item, I express the interest of my delegation to contribute further to the analysis of this topic as the work of the Commission progresses.

### ***Chapter IX – Sea-level rise in relation to international law***

The increasing challenges that sea-level rise pose are beyond doubt, including from the perspective of ensuring security and stability around the world. Using all political, legal or institutional tools under the UN umbrella to understand the complexity of the issue can greatly help the global community to prepare the best answers. Clarifying the law will undoubtedly assist in identifying and advancing the most suitable solutions to various challenges that sea level rise will pose.

For this reason, Romania was among the countries that supported the inclusion of the topic of sea-level rise in the program of work of the International Law Commission. Romania is satisfied by the work undertaken so far within the International Law Commission on this topic.

Sea-Level Rise has manifold implications for international law and the *First Issues Paper* prepared by the two co-chairs of the Study Group, in charge with the subtopic of *SLR and the law of the sea* is a clear proof in that sense. At the same time, we note with satisfaction the ample and fruitful debates on this matter, within the Study Group, during the last session of the Commission.

This *First Issues Paper* has provided a substantive, documented basis for the further analysis of the subject within the Commission. It is an important, first step, in accomplishing the challenging task that the Study Group committed itself to, namely *to undertake a mapping exercise of the legal questions raised by Sea Level Rise and its interrelated issues*.

At the same time, we welcome the balanced approach privileged in the *Paper* – underlining the preliminary character of the document and of the conclusions for each chapter, and clearly identifying the areas where further documentation and analysis are needed. Taking on board the similar suggestions for further work on certain aspects, expressed during the meetings of the Study Group and reflected in the report of the Commission, is an additional reassurance that future results will benefit of consolidated knowledge and consideration.

Both the *First Issues Paper* and the debates within the Commission reflect the complex nature of the subject and the necessity of a comprehensive approach in this mapping exercise. We took note of the work on the effect of sea level rise on the baselines (and the extended analysis of the ambulatory system of baselines versus the fixed baselines), the maritime areas and the maritime delimitations, the effect on islands, the submergence of certain formations etc. The complex nature of the matter is also reflected by the possible relevance of other issues of international law, such as the identification of potential customary law, the definition and the application of certain principles of international law, the application of certain rules from treaty law to this topic etc. Various questions on these interlinkages, posed within the Study Group, further enriched the already substantial preliminary basis put forward by

the authors of the *Paper*. Therefore, we welcome the commitment of the Study Group, as reflected in paragraph 294 of the Report, that further work will be devoted, on a priority basis, on issues such as sources of international law, principles and rules of international law, practice and *opinion juris*, navigational charts.

One of the most complex elements of the whole issue, as also reflected in the *First Issues Paper* is the effect that rising sea-level has on the baselines from which maritime areas are to be determined. We found a comprehensive analysis in the *Paper* on this particular issue and on the “divergence” between ambulatory vs. fixed baselines. This analysis included an exhaustive presentation of the relevant UNCLOS provisions, as well as of the work of other international bodies, such as the International Law Association, and specially extended reference to the State practice.

As previously mentioned, Romania believed the subject was ripe enough to be included in the work of the Commission. In this spirit, it replied positively to the request of the Commission to receive examples of national practice that might be relevant – even if indirectly – to sea-level rise in relation to law of the sea. We provided information from the national legislation and treaty practice, though conscious that it would only relate to the subject in an indirect manner. As righteously evidenced in the *Paper*, our legislation could be interpreted *as favouring an ambulatory system of baselines*, though a connection with the specific case of sea-level rise is difficult to make, given the particular character of the Black Sea as a semi-enclosed sea and less exposed to this phenomenon. We look forward to seeing the progress of the work of the Study Group on this particular issue and we welcome that further study of the national legislation on the baselines will be carried on.

To conclude, we would like to reiterate our thanks to the Co-Chairs for the first issue paper on *SLR and the law of the sea*, for their extensive work, as well as to all the members of the SLR-designated Study Group. We took note of all the extensive debates during the last session of the Commission - on both substance and methodology - and we are confident in the results to be achieved.

While expressing our support to and gratitude for the Commission’s work on this subject, let me also reiterate **our attachment to the integrity of the Convention of the Law of the Sea and our general understanding that the outcome should not lead to amending UNCLOS.**

We also look forward with great interest to the Second Issues Paper on aspects of statehood and the protection of persons affected by sea-level rise. I reiterate our commitment to engage constructively in future debates.

Thank you.