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Report of the International Law Commission on the work of its sixty-fourth session

Introduction and other issues

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Statement by

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Mr. Chairman,

Since I am taking the floor for the first time, let me congratulate you, as well as the other members of the bureau, on your election for this session of the Sixth Committee.

The Portuguese delegation is pleased to debate the first Commission's Report after last year's election for the quinquennium. Allow us to take the opportunity to congratulate all the Commission's elected members, giving a warm welcome to the new members.

We would also like to praise Mr. Mikulka for his contribution to the codification and progressive development of International Law acting in his capacity of Secretary of the International Law Commission and of the 6th Committee. The Portuguese delegation wishes him all the best in his future endeavours.

Allow us equally to thank the Chairman of the International Law Commission, Mr. Caflisch, for presenting the Report on the work carried out by the Commission during its sixty-fourth session.

In today's statement, we will begin by making some general comments on the Commission's work. We will then address the topics: "Expulsion of Aliens" and "Obligation to Extradite or Prosecute". The other topics of the Report will be addressed in the coming days, according to the clusters proposed.

Introduction and other issues (Chapters I-III and XII of the Report)

Mr. Chairman,

Portugal has followed the works and outputs of the sixty-third session of the International Law Commission with much interest. We are very pleased to note the inclusion in the Commission's agenda of two new topics: "Provisional Application of Treaties" and "Formation and Evidence of International Customary Law".

It is interesting to note that the Commission is currently dealing with three topics related to sources of International Law. This shows the need to continue to study classical International Law topics alongside more recent ones. The fast evolution in international social relations requires a constant review of International Law norms and doctrine in the light of new social contexts.

Mr. Chairman,

In respect to the combined work of the General Assembly and the Commission, we would like to share some general methodological and substantive concerns, and offer some ideas on what could be improved.

Firstly, we find that surveying the repetition of international facts should not be overrated as a working method, as it sometimes is. It is certainly a relevant legal tool but, however, as Anthony Carty wisely adverts, the practice of States alienated from a subjective criterion has little legal relevance¹. One has also to be reminded that from the 193 UN members only a minority has provided the Commission with reports on his State's practice on a given subject. This may lead the Commission to base its work merely on the practice of States who are willing to deliver such a report of practice and have the resources to do so.

On the other hand, we would like to encourage the Commission to embark on an exercise of progressive development of International Law whenever necessary to address new trends of contemporary international social relations. In this regard, one has to caution against autonomous readings of each of the sources of International Law that, as observed by Martti Koskenniemi, may turn into a formalist device to validate the substantive argumentation regarding a pre-defined result.²

Secondly, it is widely noticed that from all the UN members only a small minority intervenes at the 6th Committee debate on the Report of the Commission or in the negotiation of resolutions. This may be due to the lack of human resources of most delegations to follow the work of the 6th Committee and not to some kind of indifference.

¹ Carty, Anthony (1986) *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*. Manchester: Manchester University Press.

² Koskenniemi, Martti (2000) "Introduction" in Koskenniemi, Martti (ed.) *The Sources of International Law*. Aldershot: Ashgate, xi-xxviii.

However, from the perspective of legitimacy of International Law, we cannot want a universal law without having a plural participation in its formation.

Therefore, in the context of the UN Programme of Assistance of International Law and following the recent High Level Meeting on the Rule of Law and its outcome, we find that the aid to the development of national legal services with trained human resources to enhance a broader participation in the process of codification and progressive development, should be given a priority status.

Finally, there are other challenges that we believe also deserve consideration, such as: the election of the Commission's members has to follow not only the criteria of merit or the representation of different legal systems of the world, but also different doctrinal approaches to International Law; more interaction between the General Assembly and the Commission; greater openness to participation of civil society movements, not only at the UN level but also at national level; or not insisting upon the dogma of consensus which frequently paralyses action by the will of a minority of members thus constraining a democratic approach to the process – the Charter, in its Article 18, establishes clear vote rules for the General Assembly.

Mr. Chairman,

To conclude this part of the intervention, we would like to applaud the institutionalization of the practice to make immediately available, on its website, the Commission's provisional summary records. Portugal would like to thank in particular the Secretariat for its efforts in making this possible. They are a very useful tool to get in touch with the daily discussions of the Commission and to prepare the debates in the Sixth Committee.

On another note, Portugal considers that an additional effort must be made in order to make available the Commission's Report even earlier.

Expulsion of Aliens (Chapter IV of the Report)

Mr Chairman,

I would like now to turn to Chapter IV of the Commission's Report on the topic, "Expulsion of Aliens". I thank the Special Rapporteur, Mr. Kamto, for his work, which allowed the Commission to progress on the study of this topic.

I refer to the statement that the European Union will be delivering later to which we subscribe.

Mr Chairman,

This year, the Commission adopted on first reading a set of 32 draft articles on the expulsion of aliens as well as commentaries thereto.

Notwithstanding the detailed written comments that we shall forward later, we welcome the new wording for articles 13, 21 and 24 which improved last year's draft. This new wording also addresses some specific concerns that we had raised in our last year's statement.

Regarding the final form to be given to these draft articles, it is our belief that this subject-matter is not suitable for codification. We would, therefore, expect the draft articles to become an overview of existing legal norms, possibly establishing a general framework of principles.

Protection of persons in the event of disasters (Chapter V of the Report)

Mr. Chairman,

Allow me to now turn to Chapter V of the Commission's Report on the topic "Protection of Persons in the Event of Disasters" and start by giving the Special Rapporteur, Mr. Eduardo

Valencia-Ospina, a word of appreciation for the steady progression of his study on this topic.

Mr. Chairman,

This year, based on the fifth report presented by the Special Rapporteur, the Commission further elaborated on the duty to cooperate and addressed the conditions for the provision of assistance and the question of the termination of assistance.

Where it comes to the conditions on the provision of assistance, though we concur with the view that affected States may subject such provision to certain conditions, we think such right cannot be construed as enabling affected States to place them arbitrarily.

As so, we consider the wording proposed by the Drafting Committee for draft article 13 to be clearer than the initial proposal, particularly where it concerns the issue of the range of conditions that affected States may place to the provision of assistance. By referring that these conditions shall take into account the identified needs of the persons affected by disaster and the quality of the assistance, it prevents, in our opinion, the possibility of broad interpretations allowing the placement of random conditions.

Furthermore, we believe the Commission still needs to address some questions regarding the conditions that may be placed. The Commission should analyse situations where the conditions prove to be unreasonable or to restrict the assistance in a way that may adversely affect its quality and not offer proper protection to the persons affected by disaster. Situations where they violate International Law should also be looked into.

Moreover, the question of what happens when there is an incorrect assessment as to what are the needs of the persons affected or when the affected State cannot make such an assessment should also be analysed.

Mr. Chairman,

Regarding the termination of assistance, we share the point-of-view expressed by some members of the Commission that an approach recognizing a uniform and unilateral right of

the affected State to terminate the assistance being provided may distress the rights of affected persons.

As so, we welcome the wording proposed for draft article 15 establishing a mechanism of consultation between all actors. Nonetheless, having in mind that the main focus should be, at all times, the affected persons, we consider that this provision should also establish that these consultations take into consideration the needs of the affected people, namely if such needs have been met.

Mr. Chairman,

To conclude our intervention on this topic, allow us to make a brief reference to the fifth report presented by the Special Rapporteur.

Having read the report, we feel the need to clarify the Portuguese position on the idea that the affected State is placed under a legal obligation to seek external assistance in cases where a disaster exceeded its national response capacity, since Portugal was listed as one of the States that opposed such an idea³.

Our opinion on this issue is that there is a duty to seek assistance, which rises from the duty of the affected State to protect the persons within its territory. It was based in such conviction that, in last year's statement, we urged the Commission to further analyse this duty and study situations where, when the duty to seek assistance rises, the affected State does not do so.

Mr. Chairman,

We continue looking forward to seeing the development of the work on this topic, hoping that the Commission answers these and other questions already raised, while continuing to progress on its study.

Thank you, Mr. Chairman.

³ Fifth report on protection of persons in the event of disasters (A/CN.4/652), 9 April 2012, para. 28.