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Report of the International Law Commission

on the work of its sixty-third and sixty-fifth sessions

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

Subsequent agreements and subsequent practice in relation to the interpretation of treaties
(Chapter IV of the Report)

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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 on your election as Chairman of the Sixth Committee.

Allow us as well to thank the Chairman of the International Law Commission, Mr. Niehaus, for presenting the Report on the work carried out by the Commission during its sixty-fifth session.

In today's statement, we will begin by making some general comments on the Commission's work. We will then address the topics 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties' and 'Immunity of State officials from foreign criminal jurisdiction'. 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 work and outputs of the sixty-fifth session of the International Law Commission with much interest. The Commission continues to identify new topics suitable for inclusion in its programme of work. This proves that there are still many International Law avenues to be explored by the Commission. We are pleased to note the inclusion in the Commission's programme of work of two new topics: 'Protection of the environment in relation to armed conflicts' and 'Protection of the atmosphere'. The discussions at the Commission regarding the first topic are promising.

Mr. Chairman,

Portugal is of the view that there are still some uncharted waters relating to sources of International Law to which the Commission could contribute. One topic would be the 'relation of codification with progressive development of International Law'. It is true that in

certain cases it may be difficult to distinguish between existing rules and new ones, of which the *North Sea Continental Shelf Cases* before the ICJ[1] are good examples. Nevertheless, what are supposed to be analytical and complementary categories are in practice often dealt with as two different types of formation of International Law.

The work of the Commission is not just descriptive (codification) but should also be innovative (development). However, too often the Commission and States are reluctant in embarking in an exercise of progressive development, even where there are legal lacunae that have to be field in to avoid no law zones on human activity. In this regard, it would be also relevant to study the impact of the different civil law and common law approaches to codification.

Mr. Chairman,

Another topic of the upmost importance related to sources of International Law is '*jus cogens*'. International peremptory norms deal with basic values of international society which are instrumental for structural political goals of the present. Although the contribute to its clarification by doctrine, jurisprudence and the Commission itself, *jus cogens* – its content and the relation with other International Law norms and principles – continues to be a somewhat disputed mystery.

Mr. Chairman,

To conclude this part of the intervention, we would also like to acknowledge the work of the Secretariat in assisting the codification and progressive development process.

[1] *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), *Judgment, I.C.J. Reports 1969, p. 3.*

Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties (Chapter IV of the Report)

Mr. Chairman,

I will now turn to the topic 'Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties'. Allow us to begin by applauding Mr. Nolte, for delivering a very thorough and result-oriented report, which not only addresses the scope and the outcome of subsequent agreements and subsequent practice, but also delivers us balanced draft Conclusions to guide treaty interpretation as well as comprehensive commentaries thereto.

Portugal would also like to praise the Commission for its efforts in preserving both the normative content and the flexibility that is inherent in the concepts of subsequent agreements and subsequent practice.

Mr. Chairman,

In what concerns draft Conclusion 1, we agree that articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties do reflect Customary International Law, a view that is also shared by International Courts and Tribunals in general. Nevertheless, this conclusion should be without prejudice of the question to know if Article 31 is solely an outcome of codification or if it also results from progressive development.

Article 31 of the Vienna Convention by setting forth the general rule of interpretation of treaties, and article 32 by delivering us the supplementary means of interpretation, together constitute the integrated framework for the interpretation of treaties. Moreover, we concur with the emphasis given by the Commission in paragraph 5 of this first draft Conclusion when stating that the process of interpretation is a single combined operation.

Mr. Chairman,

Turning over to draft Conclusion 2, we share the Commission's view regarding the importance of subsequent agreement and subsequent practice in the application of a

treaty as authentic means of interpretation for the purposes of article 31 (3) (a) and b) of the 1969 Vienna Convention.

Both elements of interpretation mirror the understanding of the treaty by the parties in a specific legal and social context. This idea was already well established in the travaux preparatoires of the 1969 Vienna Convention.

Mr. Chairman,

Concerning draft Conclusion 3, we couldn't agree more with the Commission's views on the interpretation of treaty terms capable of evolving over time. Indeed, subsequent agreements and subsequent practice may also play an auxiliary role in the context of the more general question of whether the meaning of a term of a treaty is capable of evolving over time.

We stand that, in principle, a treaty is worthless if its interpretation does not follow the transformation of the social context. Treaties have dynamic character. However, there is a need for some caution with regard to arriving at a conclusion in a specific case whether to adopt an evolutive approach or not.

As the European Court of Human Rights ruled in the 2005 Mamatkulov and Askarov Case, *the European Convention on Human Rights 'is a living instrument which must be interpreted in the light of present-day conditions'*[2].

This well-known assertion perfectly illustrates the very lively evolutive approach of the European Court of Human Rights, which is based on different forms of subsequent practice. This case is paramount but is not alone. Other international judicial bodies have similar approaches. The International Criminal Tribunal for the Former Yugoslavia has often taken into account recent forms of state practice and the Inter-American Court of Human Rights sometimes employs an evolutive approach in connection with the pro homine approach, which is quite relevant in the field of International Human Rights Law.

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[2] *Mamatkulov and Askarov v. Turkey* (Applications 46827/99 and 46951/99), European Court of Human Rights, Judgment, 4 February 2005, p. 36.

Mr. Chairman,

It is indeed imperative to highlight the importance of subsequent practice for the purposes of treaty interpretation, which is regrettably too often neglected in the legitimizing discourse.

We consider that draft Conclusion 5, by examining the possible authors and attribution of subsequent practice, is a key deliverable. In this respect, allow us to add that we value the Commission's efforts when thoroughly considering the subsequent practice of many different international judicial or quasi-judicial organs.

However, subsequent practice can also be found in the practice of international organizations which are themselves parties to treaties. The United Nations or the European Union practices offer good examples. This is a matter that could be further developed in the commentaries to draft Conclusion 5.

Moreover, social practice – either national or international – is the context where state practice evolves and to which state practice cannot be in opposition. This is thus an element that should not be undervalued.

Mr. Chairman,

In conclusion, Portugal considers that the five draft Conclusions reflect International Customary Law and offer valuable guidance in Treaty interpretation. This is an interesting matter to which Portugal pays much attention.

The work of the Commission on this topic must meet with some complex challenges that should be addressed without any reservations. In any case, the Commission should not be tempted to develop International Law going beyond the Vienna Conventions on the Law of Treaties. Its efforts should follow a cautious path leading first and foremost to the clarification and guidance of States, International Organizations, Courts and Tribunals, as well as to individuals that are subjects of a given treaty.

Immunity of State Officials from Foreign Criminal Jurisdiction (Chapter V of the Report)

Mr. Chairman,

I will now address the topic 'Immunity of State Officials from Foreign Criminal Jurisdiction'.

At the outset, Portugal would like to take this opportunity to congratulate the Special Rapporteur, Ms. Escobar Hernández, for presenting the first draft Articles on the matter. This is indeed a topic of the utmost importance and in relation to which we hold high expectations.

Allow us to present our views on some of the pressing issues discussed this year, including the starting point for this exercise and the scope of the immunity *ratione personae*. We will comment on specific issues as requested by the Commission (Chapter III of the Report) later on.

Mr. Chairman,

It is Portugal's firm belief that the basis for this complex and challenging topic has to be a very clear, restrictive and value-laden approach. Law is not neutral. It is ideological in the sense that it has to reflect the values of a given society. The classical State-centric perspective and the new legal humanism are not two sides of the same coin: the latter has a higher value. Hence, from a methodological perspective, to build this analysis from the standpoint of a 'general rule of immunity' could bias the conclusions.

In this exercise we have to adopt an ontological approach to the rights of the individuals. Serving the interests of the international society means a balance between State sovereignty, the rights of the individuals and the need to avoid impunity.

Mr. Chairman,

Following this line of reasoning and as regards the material scope of immunity discussed this year by the Commission, Portugal does not share the view that immunity *ratione*

personae is absolute and without exceptions. Nor is of the opinion that it is sufficient to accept an exhaust valve merely anchored in the moral obligation of States to waive the immunity of their officials, as seems to be the approach adopted by the *Institut de Droit International* in its Resolution on the subject[3].

There is a trend in International Law and International Relations towards supporting the existence of exceptions, or perhaps even more accurately, the inexistence of immunity in certain cases.

Mr. Chairman,

There are two situations where, in our view, State officials do not enjoy immunities *ratione personae*: certain non-official acts and acts amounting to the most serious crimes of international concern.

Regarding the first situation, we think that at least certain non-official acts may indeed preclude immunity *ratione personae* for the following reasons:

First, knowing that personal immunities derive directly from State immunity, we have to keep in mind that there is a trend towards limiting immunities when concerning *acta jure gestionis*.

The ICJ, even in its somewhat conservative approach, has recognized that trend in its judgment regarding the case *Jurisdictional Immunities of the State*[4]. It seems to us that there is no justification for establishing the immunities of State officials within parameters different from the ones used to limit the immunity enjoyed by States.

Second, immunities are imminently functional, as it can be inferred, for instance, from the Vienna Conventions on Diplomatic and Consular Relations or from the Convention on Special Missions. Any act performed for personal benefit is out of the scope of immunities.

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[3] Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, Institute of International Law, Napoli session, 2009.

[4] *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), Judgment, ICJ, www.icj-cij.org/docket/files/143/16883.pdf, at 25.

As it was well pointed out by the Secretariat in its 2008 Memorandum, this is the case not only for immunities *ratione materiae*, but also for immunities *ratione personae*.

Third, although the rationale behind immunities of State officials is to ensure the effective performance of their functions on behalf of their respective State, that does not mean that every act – public or private – of a Head of State, Head of Government or Minister of Foreign Affairs should have the same protection. A balance should be carefully drawn between the official function of representation and the private realm were, at least in this latter domain, considerations of *ordre public* and regarding individual rights should prevail.

Mr. Chairman,

In what regards the second situation – the performance of acts amounting to the most serious crimes of international concern –, Portugal strongly believes that the most serious crimes of international concern are *ab initio* not subject to any immunity consideration. In some cases such crimes are committed as an 'official act'. Nevertheless, the quality of 'official act' is irrelevant in these circumstances. Furthermore, as already stipulated in the *draft Code of Crimes against the Peace and Security of Mankind*, the official position of the perpetrator does not confer any immunity on him / her.

Therefore, the movement of limiting immunity at a 'vertical' level – at the level of the international criminal justice system – has to be followed by a 'horizontal' harmonization at the level of the relations between the States and the individuals within their jurisdiction. As the two dimensions – vertical and horizontal – are in reality part of the same system, they should be harmonized towards the limitation of both immunity and impunity.

Mr. Chairman,

For all these reasons we cannot agree with draft Article 4(2) where it states that immunities are absolute, encompassing official and private acts. The distinction between immunities *ratione personae* and *ratione materiae* is methodological in nature and is relevant essentially because it enables to recognize a State official solely by virtue of his / her office. In both cases, immunity – which is by itself an exception – should apply only to official acts.

Furthermore, in Portugal's view there is a level of non-compliance with the Law that cannot ever be exceeded and where the criterion of effective performance of functions by State officials is not relevant regardless of the quality of the State official. This is particularly true in the case of *jus cogens*. Therefore, the most serious crimes of international concern – like genocide, crimes against humanity and war crimes – as well as other international crimes – as transnational organized crime or terrorism – should *ab initio* not be subject to any immunity consideration. Echoing what a member of the Commission said in this year's discussions, we agree that this is something that the draft articles should clarify right from the very beginning.

As we have already said in the past, there should be no anxieties about embarking on an exercise of progressive development of International Law.

Mr. Chairman,

As far as the personal scope is concerned, we concur with the Commission in the view pursuant to which Heads of State, Heads of Government and Ministers of Foreign Affairs are recognized as State officials solely by virtue of their office. We also agree with the temporal scope as proposed.

Nevertheless, we would like to suggest either including the various dimensions of the scope in just one draft Article or having a draft Article per dimension, as was proposed by the Special Rapporteur.

Mr. Chairman,

To conclude Portugal's intervention, we would like to encourage the Commission to develop such relevant topic according to a value-laden approach. Immunity cannot ever exist as a privileged exception over individual rights and public order.

Thank you, Mr. Chairman.