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Report of the International Law Commission

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

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Statement by

Mr. Mateus Kowalski

Assistant Legal Adviser

Ministry of Foreign Affairs of Portugal

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

Mr. Chairman,

Portugal would like to address Chapter VI of the Commission's Report on the topic 'Protection of persons in the event of disasters'.

This year the Commission had before it the sixth report of the Special Rapporteur, that focused on the pre-disaster phase, namely on the prevention and mitigation of a disaster. We would like to commend Mr. Valencia-Ospina for another thorough report.

Portugal has had the opportunity to state that the Commission should approach, at a later stage of its work, the pre-disaster phase. The discussion of this topic should be, at its initial stage, restricted to the response to disasters which have occurred, since it dealt with questions such as sovereignty, territorial integrity and non-interference in domestic affairs. We have some concerns as to whether this discussion is sufficiently consolidated at this point in order to proceed to a second stage. There are questions which were raised during the debate that we feel are yet to be given answers.

Nevertheless, we would like to offer some considerations to the discussion on the pre-disaster phase.

Mr. Chairman,

Prevention can be considered as an established general principle of international law. It is – as shown by the Special Rapporteur in his report and referred to by the Commission in its commentary to draft article 16 – present in several domains of international law and is referred to in several instruments and decisions by international and regional courts. In this sense, we concur that there is a positive obligation to prevent the violation of rights, namely the violation of human rights.

When further delving into the question of protection and the duty to reduce the risk of disaster, as foreseen in draft article 16, we consider that the Commission must seek to clarify what is the degree of risk expected. It is important to make clear when do the duty to

reduce the risk of disaster and the obligation to take measures to prevent, mitigate and prepare for disasters rise for States.

In our view, this question will have to take into analysis the definition of "risk". This issue has been previously approached by the Commission on its draft articles on Prevention of Transboundary Harm from Hazardous Activities and could be now used on the discussion of this topic.

Mr. Chairman,

When it comes to the issue of co-operation, Portugal has had the opportunity in the past to state that this is an important question. It should be established as a general rule without prejudice of the sovereignty of States and having regard to principles such as non-interference. As so, it should also be considered when debating the pre-disaster phase.

Therefore, we welcome the inclusion of what was presented by the Commission as draft article 5*ter*, which extends co-operation to measures to be taken with the intent to reduce the risk of damage.

Mr. Chairman,

We continue looking forward to seeing how the work of the Commission will progress. We hope the Commission, as it proceeds with its study on this topic, will continue keeping in mind that the main focus of this topic should be, at all times, the individual and, as so, it will strive to take a rights-based approach.

Formation and Evidence of Customary International Law (Chapter VII of the Report)

Mr. Chairman,

Allow us now to address Chapter VII of the Commission's Report regarding the topic 'Formation and Evidence of Customary International Law'. We would like to take this opportunity to congratulate Mr. Wood for his work and for delivering his first report.

Mr. Chairman,

From our side there is no resistance to the change of the topic's title. In any case, the scope should remain the same by including both 'formation' and 'evidence' of customary international law.

In relation to the balance between 'formation' and 'evidence', we are of the opinion that despite the fact that both elements are important for the topic, a particular emphasis should be given to 'formation'. Through the description of how customary Law was formed one will be able to better identify a methodology which will allow us to identify current and future norms of customary international law. Therefore, the study on 'formation' should precede the more practical issue of how the evidence of a customary rule is to be established.

Mr. Chairman,

There was a debate in the Commission regarding the relevance of undertaking a study of *jus cogens* within the scope of the topic. We find that it will be difficult for the Commission to not consider this subject in its analysis. It is not a question of studying *jus cogens per se*, but to study it as an expression of peremptory norms which have their source in customary international law.

Mr. Chairman,

Portugal encourages the Commission to proceed in this endeavour with a wide approach regarding the research to be done. In our view, all relevant case-law of different courts and tribunals should be appraised critically and not as a final revelation of existing law – we have some reservations as to whether there is consistency in judicial pronouncements. Doctrine, from different theoretical backgrounds, is also a most relevant element of research. We concur with a flexible and pragmatic outcome. However, that may demand that the Commission takes position regarding some different theoretical approaches to customary international law.

Moreover, we agree that the practice to be examined should be contemporary, paying attention to the different practices and cultural backgrounds from the various regions of the world. Nevertheless, the Commission should be very careful in assessing State practice since a precise repertoire of practice is a luxury of only a few States. It is worth recalling some critics by post-colonial approaches to International Law: a great deal of the 'conventions of international public order' of the last century resulted from the codification of customary law developed by colonial and former colonial powers.

Furthermore, practice from international organizations and other relevant non-state actors can also be of value.

Mr. Chairman,

We would like to suggest that a reference should also be made to the *coutume sauvage*. Those are unusual cases where the formation of customary law begins with a 'need for law' – meaning that in such cases the *opinio juris* precedes a reiterated practice.

The *Continental Shelf case*[1], as well as other case-law, touch upon this problematic matter highly debated in doctrine. We believe this is an issue to which the Commission could offer its expertise and shed light on this grey area of customary International Law.
Mr. Chairman,

Portugal concurs with the "two-elements" approach to examine both practice and *opinion juris* as proposed by the Special Rapporteur.

Opinio juris sive necessitates as the psychological or subjective element of Customary International Law, is not easy to be inferred. But without this element what remains is a mere practice and not a legal norm. We strongly encourage the Commission to focus also on this constituent element without any anxiety about recognizing the relevance of 'subjectivity' in International Law.

The opinion that a reiterated practice entails almost necessarily the existence of *opinio juris* is a presumption *juris tantum* without a credible scientific basis. Therefore, we do not

[1] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, I.C.J. Reports 1982, p. 18.

agree with the view expressed by the International Law Association that the subjective element is not in fact usually a necessary ingredient in the formation of customary International Law[2].

The conviction that the non-compliance with a certain practice will result in international responsibility is one good indicator of *opinio juris*.

Provisional Application of Treaties (Chapter VIII)

Mr. Chairman,

Turning now to the topic 'Provisional Application of Treaties', Portugal would like to congratulate Mr. Gómez-Robledo for delivering his first report, which we have read with interest.

The provisional application of treaties may have different reasoning, as Mr. Waldock pointed out at the Vienna Conference in 1969[3]: the need for urgency in the application of a treaty; or when the content of a treaty seems highly desirable and its entry into force is not doubtful. Nevertheless, being provisional in nature, such provisions have a transitory application in a reasonable time frame.

The scope is not limited to States but includes all parties to a treaty subject to provisional application. Hence, it includes International Organisations. Portugal encourages the Commission to study this issue at the light of both 1969 and 1986 Vienna Conventions on the Law of Treaties.

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[2] International Law Association (2000) *London Statement of Principles Applicable to the Formation of General Customary International Law.* Conference Report of 29 July 2000.
[3] United Nations Conference on the Law of Treaties (1970) *Official Records of the Second Session:* Vienna, 9 April-22 May 1969. New York: United Nations.

Mr. Chairman,

We know, from the *travaux preparatoires* of the 1969 Vienna Convention, that there was some dispute concerning the acceptance of the provisional application regime[4]. At the end, it was adopted as Article 25. In 1969 as today the big questions are the same: how can a treaty be applicable if it is not yet in force? And, how can a treaty be applicable without passing through the domestic democratic controls? Through the lens of International Law, it can. In the *Yukos* case the arbitral tribunal recognized that such provision is binding and enforceable.

However, the consent of the Parties providing strength to the *pact sunt servanda* principle implies that the provisional application of treaties also depends on the consent of the Parties regarding a given treaty. In fact, the provisional application of a treaty is a domestic legal and political option which cannot be imposed. This means that the provisional application of a treaty always depends on the consent of a signatory State or International Organisation. Clauses should be carefully designed in order to offer a clear opportunity to signatories to express their consent, or not, to the provisional application of a treaty.

From the perspective of States' domestic law of States, there are different legal approaches that have to be respected. The first one would be that the domestic law does not allow the provisional application of any treaty. Pursuant to the legal approach in other States, the provisional application is accepted but only after passing all the required internal democratic controls. Finally, another possibility is the acceptance of provisional application without any other requirement than those settled in Article 25 of the 1969 Vienna Convention.

In this regard, we echo the viewpoint of some of the members of Commission when advising that the work on the topic should not promote the provisional application of treaties. Its work should stick to the clarification and guidance regarding this matter.

[4] *Ibidem.*

Mr. Chairman,

As we understand it, the main purpose of this study should be ascertaining the effects of the provisional application. That includes the effects of the breach of obligations being provisionally applied.

Once the signatory accepts the provisional application, the non provisional application of the treaty as agreed may trigger international responsibility. That does not mean that the Commission should deal directly and autonomously with the regime of International Responsibility. Nevertheless, this is an effect that the Commission should consider as well.

Mr. Chairman,

As regards the obligation to not defeat the object and purpose of a treaty prior to its entry into force (Article 18 of the Vienna Conventions), we find that both this obligation and the provisional application are related and have the same scope *ratione temporis*. Nevertheless, they lead to two different legal regimes and the provisional application obligations are wider in their scope and legal effects.

Mr. Chairman,

To conclude Portugal's intervention on this topic, we concur with most of the suggestions voiced at the Commission within the broad range of issues for possible discussion.

In what concerns the final outcome, we deem it is still premature to have a decision on the final form of the Commission's work. However, being a topic that cannot go further than what is already provided for in the 1969 and 1986 Vienna Conventions, there is no room for progressive development.

The Commission's work is to clarify the legal regime of provisional application of treaties. Therefore, for the moment, Portugal inclines to consider that a guide with commentaries and model clauses would be the best outcome regarding the topic.

Protection of the environment in relation to armed conflicts (Chapter IX of the Report)

Mr. Chairman,

Turning now to the topic 'Protection of the environment in relation to armed conflicts', Portugal would like to begin by commending the Commission and the Special Rapporteur for beginning the discussions on this topic. We hope that the work of the Commission may have a positive impact on the protection of the environment and on the limitation of the effects or armed conflicts.

Armed conflicts have, by nature, negative impacts on the life of people and on their ecosystem. In what concerns environment specifically, the impact is durable and very difficult to revert thus extending the negative effects of armed conflicts. As stated in the Rio Declaration, 'warfare is inherently destructive of sustainable development'[5].

The key issue at stake is the preservation of the environment in the case of armed conflicts. Nevertheless, this purpose has to go hand in hand with disarmament, non-proliferation, conflict prevention and with the progressive restriction – legally and politically – of the recourse to armed conflicts.

Mr. Chairman,

We agree with the Special Rapporteur to approach this topic in three different phases: before, during and after the armed conflict. However, this distinction should only be for analytical purposes in order to facilitate the identification of obligations and effects in the temporal line concerning the protection of the environment.

In our opinion, Phase II – the protection during armed conflicts – is the most important phase, without prejudice of an integrated approach. It is during armed conflicts that the environmental impact is produced. International Law cannot step down and take as a point of departure a pure pragmatic view of the inevitability of destruction of environment during

[5] See Principle 24 of the Rio Declaration of 1992.

armed conflicts. If existing international legal obligations are not sufficient regarding this phase, then the Commission should embark in a progressive development exercise.

Mr. Chairman,

Since the impact of armed conflicts on the environment depends in a great deal of the type of weapons used, the issue of weapons has to be necessarily addressed by the Commission. The ICJ, in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, has stated that there exists a 'general obligation (...) [on] the prohibition of methods and means of warfare which are intended, or may be expected, to cause [environmental] damage'[6] Certainly, the issue is not easy to deal with for technical and legal reasons. Even so, it is key for the development of the topic.

Mr. Chairman,

With respect to the final outcome of the topic, Portugal feels that it is still premature to take a stance on the issue. The work by the Commission in unveiling the existing law on the protection of the environment in relation to armed conflicts will be decisive to settle on the final outcome. For the time being, we do not exclude the necessity for progressive development in this domain.

To conclude, Portugal would like to convey its support to the Commission while dealing with this topic. A topic that should be approached without any reservations.

Mr. Chairman,

To conclude, we would like to encourage the Commission to proceed with the work on this really important topic as proposed. Regarding the final form to be given to the Commission's work, we concur that the most useful outcome would be a set of clear conclusions with commentaries.

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[6] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226*, at p. 20.

The obligation to extradite or prosecute *(aut dedere aut judicare)* (Chapter X of the Report)

Mr. Chairman,

Let me now address Chapter X of the Commission's Report and make a brief comment on the topic "The obligation to extradite or prosecute *(aut dedere aut judicare)*".

Mr. Chairman,

As in previous years, Portugal continues emphasizing the relevance of this topic. There is no doubt that the obligation to extradite or prosecute rises from the general pursuit by States of the prevention of the impunity of offenders and the creation of safe havens for them.

The Working Group, on its report, referred that several questions have been raised during the work of the Commission on this topic, questions which we deem to be important. It also pointed out that the judgement rendered by the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case[7] has brought new elements into the discussion, which may be helpful towards moving forward.

Mr. Chairman,

In light of this, we urge the Commission to resume its study on this matter and we must recall the Resolution adopted on the Report of the International Law Commission on the work of its sixty-fourth session[8], where the General Assembly once again invited the Commission to give priority to this topic, and work towards its conclusion.

We hope, when analysing the report of next year, to see the Commission providing some answers to the already existing questions and closer to reaching a set of harmonized rules.

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[7] *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, ICJ, http://www.icj-cij.org/docket/files/144/17064.pdf

[8] Resolution A/RES/67/92.

The Most-Favoured-Nation Clause (Chapter XI)

We will now elaborate on the topic Most-Favoured-Nation clause.

We would like to begin by congratulating the Co-Chairmen, Mr. Forteau and Mr. McRae, on their valuable contribute. At the same time, we wish to commend Mr. Murase and Mr. Hmound for their working papers.

In our intervention today, we will focus on the scope of the MFN clause, in particular on the discussion regarding its extension to the dispute resolution system.

Mr. Chairman,

The *Mafezzini* award[9] decided that MFN clauses should extend to procedural dispositions, thus including settlement of dispute clauses. In the post-*Mafezzini*, some States reacted to the award denying the extension of MFN clauses to the dispute resolution system. Moreover, according to some international arbitration case law, arbitrators could not automatically decide such expansion of MFN clauses. Hence, there is no common position on this vital issue, be it between States or among tribunals.

The *Maffezini* and *Daimler*[10] cases advocate the interpretation of Parties' intention as the driving force behind the decision whether settlement disputes clauses fall or not within the scope of a MFN clause. We can foresee three kinds of situations, in particular in Bilateral Investment Treaties: a clause extending the MFN Clause to the dispute resolution system; a clause denying such extension; or an omission.

Two different perspectives are at stake: an offensive approach, where the interests of the investor are predominant; a defensive approach which gives primacy to the interests of the State or of a regional economic integration organization.
Mr. Chairman,

[9] *Maffezini* v. *The Kingdom of Spain,* ICSID Case No. ARB/97/7, award of 13 November 2001.
[10] *Daimler Financial Services AG* v. *Argentine Republic*, ICSID Case No. ARB/05/01.

To determine the approach chosen by the Parties in a BIT, it is necessary to have recourse to the rules of treaty interpretation, as established in the Vienna Conventions on the Law of Treaties of 1969 and 1986. Allow us to just briefly comment on the contextual element of interpretation.

In his opinion regarding the *Daimler* award, Mr. Bello Janeiro correctly underlined the importance of the will of the Parties at the conclusion of a BIT as regards the interpretation of the scope of a given MFN clause. He was referring to the BIT between Germany and Argentina of 1991.

However, one cannot forget the context evolution and the dynamic nature of treaties as instruments of International Law. In the *Gabcikovo-Nagymaros* case, the International Court of Justice issued a well-known legal assertion in relation to the 1977 Treaty between Hungary and Slovakia, stating that 'the treaty is not static'[11]. Also, in the 2005 *Mamatkulov and Askarov* case, the European Court of Human Rights noted that the European Convention on Human Rights 'is a living instrument which must be interpreted in the light of present-day conditions'[12].

Mr. Chairman,

Portugal supports the Study Group's willingness to approach this matter against the background of general International Law. Portugal concurs that this option is the most suitable to avoid further fragmentation of International Law.

To conclude, and as we are all aware, this particular topic is a matter with a high degree of complexity and to which there are different approaches. To carry out work that may lead to a forced uniformization of practice and jurisprudence, it might lack any practical consequences. Having said this, Portugal is confident that the Commission will produce a coherent practice guide to the interpretation and application of the Most-Favoured-Nation clause.

Thank you, Mr. Chairman.

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[11] *Gabčikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, p. 7 – para. 11.
[12] *Mamatkulov and Askarov v. Turkey* (Applications 46827/99 and 46951/99), European Court of Human Rights, Judgment, 4 February 2005, p. 36.