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

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The Obligation to Extradite or Prosecute (*aut dedere aut judicare*) (Chapter VI of the Report)

Mr. Chairman,

I will start by briefly turning to Chapter VI of the Commission's Report on the topic 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)' that reaches its conclusion this year.

Mr. Chairman,

The Commission has had the opportunity to examine the final report of the Working Group which summarized the work of the Commission on this subject over the past few years.

As emphasized in the report, the discussion on the obligation to extradite or prosecute raised important issues. However, we feel that the Commission was unable to find solutions and give clear answers to all of these issues and, as a consequence, it encountered difficulties in continuing with its work.

Mr. Chairman,

Portugal has repeatedly stressed the importance of this topic, taking into consideration the objectives underlying this obligation, which we have stated many times and cannot be overlooked: the fight against impunity for offenders and against the creation of safe havens for them. The legal community and the international society in general must continue to debate the obligation to extradite or prosecute and strive to find answers to the questions raised by the Commission.

Therefore, we consider that the Commission's work over the past few years and contained within the final report of the Working Group forms a good basis for continuing to discuss this subject in other settings.

In this sense, we commend the Commission and the Working Group on their study of this topic, which we recognize was difficult and complex.

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

Mr. Chairman,

Let me now turn to the topic 'Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties'.

Portugal would like to once again commend the Special Rapporteur, Mr. Nolte, for his thorough report and his effort in addressing issues and concerns that were raised, not only during the work of the Commission, but also during the debate in the Six Committee of last year.

Mr. Chairman,

This year, the Commission adopted five more draft conclusions relating to several aspects concerning the topic at hand, such as the identification of subsequent agreements and subsequent practice, as well as their possible effects on the interpretation of treaties and their weight as means of interpretation.

Portugal considers that these five draft conclusions, just as the ones adopted in the previous year, offer valuable guidance in the interpretation of treaties and reflect customary international law.

Mr. Chairman,

We concur with the view shared by some of the members of the Commission that subsequent practice under Article 31, paragraph 3 and under Article 32 of the Vienna Convention on the Law of Treaties should not be addressed as being an identical situation.

While in Article 31, paragraph 3 subsequent practice is an element of interpretation under the general rule of interpretation of treaties, in Article 32, subsequent practice is a supplementary mean of interpretation. In fact, a clear distinction between these two

situations has already been made by the Commission last year, in paragraph 3 of draft conclusion 4 and in its commentary thereto.

In this sense, we welcome the redrafting that was operated by the Drafting Committee on this year's draft conclusions in order to make a clear distinction between these two different situations. *It is our expectation that the Commission and the Special Rapporteur will continue to address Articles 31 and 32 at different levels when proceeding with their analysis of this topic in the following years.*

Mr. Chairman,

Paragraph 2 of draft conclusion 8 (*Weight of subsequent agreements and subsequent practice as a mean of interpretation*) draws to attention a relevant question when it comes to subsequent practice. Its weight in the interpretation of treaties depends on whether and how it is repeated.

As pointed out by the Commission in the commentary to this conclusion, the continuity in time as well as the character of the repetition of the subsequent practice demonstrates how rooted a particular position of States regarding the interpretation of a treaty is. We, therefore, welcome the insertion of such reference in the text of this draft conclusion.

Mr. Chairman,

To end our intervention on this topic, Portugal reiterates that the Commission must avoid the temptation of going beyond the Vienna Conventions on the Law of Treaties. Its work should strive to clarify and guide States, international organizations, courts and tribunals, as well as individuals that are subjects of treaty rights and obligations.

This is a topic to which Portugal attaches quite some importance and therefore we look forward to seeing how the Commission will continue its approach on this topic, namely when delving into the new questions foreseen in the plan of work and addressing question that have already risen as its work progresses.

Protection of the Atmosphere (Chapter VIII)

Mr. Chairman,

I will now address the topic 'Protection of Atmosphere'. Portugal would like to begin by commending Mr. Murase for the first report on this pressing matter.

Being that the topic demands immediate attention, we agree with the Commission's position of refraining from intruding into any political negotiations. The emergency and contingency of this issue means that it needs to be primarily dealt with, as a matter of urgency, within the policy realm. Having said that, to study the protection of the atmosphere from a legal perspective can be a good contribution to finding solutions in a broader diplomatic setting. Indeed, and by its own nature, an International Law approach to the matter can contribute to the development of a global environmental ethic and accentuate the need for a universal, distributive and equitable action.

Mr. Chairman,

Regarding the scope of the guidelines, we agree with the members of the Commission who requested a methodological approach based on the 'cause and effect' double element. For instance, it has been demonstrated that the degradation of the atmosphere may have concurrent causes that may be difficult to decompose and to attribute to specific operators and/or States. Additionally, the adverse consequences may also be felt where the contribution of human activity to the degradation of the atmosphere is relatively small.

The level of impact of the degradation of the atmosphere on society, as well as its prevention, mitigation or even reversal, depends on the ability of human communities to change behaviors at political, technological, economic and lifestyle levels. Therefore, in terms of legal analysis, there is an imperative to address the problematic from a 'cause and effect' perspective.

Mr. Chairman.

This is a topic to which Portugal attaches great importance. The Commission may have an important contribution to this vital debate on our common future as humankind. We, thus, encourage the Commission to proceed with its work and to explore without any hesitations every aspect of the legal dimension of the protection of the atmosphere.

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

Mr. Chairman,

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

Portugal would like to thank the Special Rapporteur, Ms. Escobar Hernández, for her third report and to commend her for the contribution given to the development of this topic.

Mr. Chairman,

It is Portugal's firm belief that the basis for this legally complex and politically challenging topic has to be a very clear, restricted and value-laden approach. Serving the interests of international society means to achieve a balance between State sovereignty, the rights of individuals and the need to avoid impunity.

*Therefore, for reasons that we had opportunity to share over the past years, it is our long-standing position that the distinction between immunities *ratione personae* and *ratione materiae* is methodological in nature and is relevant mostly because it enables the recognition of a State official solely by virtue of his or her office. In both cases, immunity – which is itself an exception – should only apply to official acts.*

This line of reasoning justifies our opinion that the material scope of immunity must be given precedence over its subjective scope. It is the official nature of the act that indicates if a State official enjoys immunity.

Mr. Chairman,

As regards the definition of 'State officials' (draft article 2 (e)), we are pleased with the definition proposed by the Commission. It is straightforward and broad enough to allow a case-by-case interpretation. Nevertheless, that also means that the commentary on the definition has to establish very precise criteria for such interpretation.

As for the concept designation, we agree that the term 'official' is more appropriate than the term 'organ'. The term 'official' refers very clearly to an individual or a natural person, the subject of immunity in the present topic. For example, the *Certain Questions of Mutual Assistance* case¹ widely uses the term 'official'. In contrast, the term 'organ' lends itself to confusion with a legal person, which falls outside the scope of this topic.

Mr. Chairman,

Turning now to draft Article 5, on the persons enjoying immunity *ratione materiae*, we do agree that any act performed for the benefit of the person falls outside the scope of immunity from the exercise of foreign criminal jurisdiction. Immunities are functional in nature and should be as limited as possible. Therefore, considerations of *ordre public* and regarding individual rights should prevail over any act performed within the private sphere of a State official.

In this regard, it is our understanding that it would be advantageous to refer in the commentaries to the draft articles that the immunities are without prejudice to the States' general obligation to consider withdrawing the immunity of one of its own State officials when requested.

Furthermore, and where the immunity is not withdrawn, it should also be referred in the commentaries that States have a legal obligation to prosecute at home their own State officials who commit a crime abroad in the exercise of State functions. *Since such obligations apply to all State officials, including those who enjoy immunity ratione personae, such commentaries could be placed either in draft article 1, on scope, or specifically in both draft articles 4 and 5 (persons enjoying immunities ratione personae and ratione materiae, respectively).*

¹ *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment, I.C.J. Reports 2008, p.177.

Mr. Chairman,

The Commission decided to use the phrase “acting as such” in draft article 5 precisely to emphasize the functional nature of immunities *rationae materiae*. Although we agree with the choice of this phrase, we also believe that the Commission could further explain the minimum content of the necessary link between the official and the State on whose behalf he or she acts.

For instance, if a person acts *ultra vires* – *that is* – *if a person acts on behalf of the State but without having the necessary powers to do so*, such person should not be entitled to immunity. Other situations that would also be useful to clarify include the cases of corruption or coercion of State officials.

Mr. Chairman,

To conclude Portugal’s intervention on this topic, we would like to share with you that we are pleased with the work plan proposed by the Special Rapporteur in her last report. Meanwhile, we would like to encourage the Commission to develop this relevant topic according to a value-laden approach.

The discussion around this topic, both within and outside the Commission, is illustrative of a broader debate on the core principles that should frame the international social relations and its normative structure in the 21st century. Immunities cannot exist, ever, as a privileged exception over individual rights and public order.

Thank you, Mr. Chairman.