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Item 78

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

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Identification of Customary International Law (Chapter X of the Report)

Mr. Chairman,

I will now address Chapter X of the Commission's Report on 'Identification of Customary International Law'. We would like to take this opportunity to congratulate Mr. Wood for his work on the topic.

In our comments, we will have as reference the text of the latest version of the eight draft conclusions provisionally adopted by the drafting committee, regardless of the fact that they will only be submitted formally to the Commission's at the next year's session.

Mr. Chairman,

Portugal concurs with the 'two-elements' approach to examine both practice and *opinio juris* as proposed by the Special Rapporteur. *This option is relatively consensual: indeed the identification of customary law should be looked in the dynamics of those two elements in totum. The most difficult theoretical question is the degree of importance that should be given to opinio juris in the equation. In Portugal's view opinio juris should be studied without any anxiety about recognizing the relevance of 'subjectivity' in International Law.*

As to proving the existence of customary international law, we think that the burden should lie on the party claiming its existence. Additionally, we agree that the judge has the power to examine *ex officio* the existence of a certain norm of customary international law. This seems to be also the view of the ICJ as expressed in the Asylum case¹.

Mr. Chairman,

Regarding the 'general practice' element, Portugal agrees 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. The Commission should also be very careful in assessing State practice since a precise repertoire of practice is available only from a few States.

¹ *Asylum (Colombia v. Peru), Judgment, I.C.J. Reports 1950, p. 266.*

Moreover, we consider that the practice of International Organizations is relevant for the identification of customary international law. Many International Organizations have competences that used to belong to the classic sovereign State. The European Union is an illustrative case since some of the traditional competences of its member States have been transferred totally or partially to the Union.

Furthermore, the practice of other non-State actors could also be worth exploring. For instance, the International Committee of the Red Cross has produced a well-known study on customary International Humanitarian Law² where practice of non-State actors is referred to. In another example, in the Aminoil case³, the arbitral tribunal considered that private companies can indeed contribute to the formation of customary international law.

Mr. Chairman,

Regarding the definition of customary international law, the expression ‘accepted as law’ is, in our view, too closely attached to a mere voluntaristic approach that echoes the decision in the Lotus case of 1927⁴. However, the expression *opinio juris* is less about a voluntary adherence to law and more a conviction of the existence, or just a strong and general necessity, of a certain legal obligation. Such conviction may have roots on certain ethical or moral perceptions and on specific social contexts.

As such, we encourage the Commission to further study the issue of the formation of *opinio juris* in time, the question being ‘at which moment can it be said that there is an *opinio juris* regarding a certain practice?’ In this context, it is interesting to note that the ICJ, in the Nuclear Weapons advisory opinion, uses somewhat enigmatic temporal expressions such as the “gradual evolution of the *opinio juris* required for the establishment of a new rule” or “nascent *opinio juris*”⁵.

² Henckaerts, Jean-Marie; Doswald-Beck, Louise (eds.) (2005) *Customary International Law*. Cambridge: Cambridge University Press.

³ *Government of Kuwait vs. American Independent Oil Company*, Award of 24 March 1982, published in *International Legal Materials*, 21(5), 976-1053.

⁴ *Affaire du Lotus (France c. Turquie), Jugement, Recueil des Arrêts de la Cour Permanente de Justice Internationale, 1927, série A, 10.*

⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 255.*

Mr. Chairman,

Portugal encourages the Commission to proceed in this much needed revisitation of international customary law. That demands the Commission to continuously take a position regarding some different theoretical approaches to customary international law and to International Law in general.

As to the final outcome, we do concur with a flexible and pragmatic outcome, such as a guide to practice, to assist practitioners in identifying customary international law. A guide that would certainly also be of great value to scholars.

Protection of the Environment in relation to Armed Conflicts (Chapter XI of the Report)

Mr. Chairman,

I will now turn to the topic 'Protection of the Environment in relation to Armed Conflicts'. Portugal would like to congratulate the Special Rapporteur, Ms. Jacobson, for her preliminary report on the topic, which we have read with interest.

The main issue at stake is the preservation of the environment in the event of armed conflicts. Nevertheless, this purpose has to go hand in hand with disarmament, non-proliferation, conflict prevention and progressive restriction – legally and politically – of the recourse to armed conflicts. As stated in the Rio Declaration, "peace, development and environmental protection are interdependent and indivisible"⁶.

Mr. Chairman,

As we have had the occasion to state before, 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

⁶ See Principle 25 of the Rio Declaration of 1992.

identification of the 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 mostly during armed conflicts that the environmental impact is produced.

The Commission's work on this topic has also to take into consideration the law of armed conflict which addresses the protection of the environment in a limited way. If existing international legal obligations are not sufficient, then the Commission should consider embarking in a progressive development exercise.

Mr. Chairman,

The impact of armed conflicts on the environment depends a great deal on the type of weapons used. 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”⁷. As such, the issue of ‘weapons’ has to be necessarily addressed by the Commission, even if only from a general perspective.

Mr. Chairman,

Portugal agrees that non-international armed conflicts should be included in the scope of this topic. Most of the ongoing armed conflicts are intrastate. A UNEP report on the issue even suggests “that at least forty percent of all intrastate conflicts over the last sixty years have a link to natural resources”⁸.

Therefore, non-international armed conflicts cannot be overlooked in the analysis of the impact of armed conflicts on the environment.

⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 20.*

⁸ United Nations Environment Programme (2009) *Protecting the Environment during Armed Conflict: an Inventory and Analysis of International Law*. Nairobi: UNEP.

In this sense, we also agree with the inclusion of armed conflicts between non-state actors or between non-state actors and States. However, it should be noted that, in these cases, an armed conflict also implies a minimum level of intensity of hostilities. Therefore, we would welcome a reference to the exclusion of ‘internal disturbances and tensions’ as provided in the Additional Protocol II to the Geneva Conventions and in the Rome Statute.

Mr. Chairman,

We support the idea to consider human rights as part of the topic, which would widen the analysis and strengthen the outcome of the Commission’s work. We believe that a substantive analysis by the Commission of the triangular relation between human rights, environment and armed conflicts will provide some conclusions of interest to the topic. The special relationship of indigenous peoples with the environment supports the idea of according a separate treatment to indigenous rights.

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.

In conclusion, we would like to encourage the Commission to proceed with the work on this important topic as proposed.

Provisional Application of Treaties (Chapter XII)

Mr. Chairman,

I will now address the topic “Provisional application of treaties”.

Portugal wishes, first of all, to thank Mr. Gómez-Robledo for his second report on the topic which provides a substantive analysis of the legal effects of the provisional application of treaties.

Mr. Chairman,

Portugal agrees that the provisional application of treaties does give rise to legal obligations, as if the treaty was in force for the signatories applying it. Those legal obligations are treaty based.

Domestic law concurs, of course, with the decision of a State to apply treaty norms provisionally. *For example, it is common in treaty practice to have a clause making provisional application dependent on its compatibility with domestic law. This is the case with, for instance, Article 45(1) of the Energy Charter Treaty which states that “each signatory agrees to apply this Treaty provisionally (...) to the extent that such provisional application is not inconsistent with [the signatory’s] constitution, laws or regulations”.*

Therefore, the two parts of this equation should be studied. The focus of the Commission should be, naturally, in the International Law aspects of provisional application. Nevertheless, since the purpose of the Commission’s work regarding this topic is to provide guidance, a comparative study of relevant domestic law would be helpful.

Mr. Chairman

As for the legal consequences of breach of a treaty being applied provisionally, we agree with the conclusion of the Special Rapporteur. Once the signatory accepts the provisional application, the violation of obligations of such treaty may amount to a wrongful act and, as such, trigger international responsibility. Therefore, a violation of a provisionally applied treaty should bear the same consequence as the violation of a treaty already in force.

Mr. Chairman,

We support the decision of the Commission to also consider the legal regime applicable to the provisional application of treaties between States and International Organizations, as

well as between International Organizations. Furthermore, the Commission should also consider, besides State practice, case-law and doctrine.

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.

The Most-Favoured-Nation Clause (Chapter XIII of the Report)

Mr. Chairman,

I will now briefly address the topic Most-Favoured-Nation clause.

Portugal would like to commend the Chairman of the Study Group, Mr. McRae, for his contribution to the development of this topic.

Mr. Chairman,

The increasing relevance of MFN clauses in international relations, involving public and private actors, justifies the relevance of this topic. Having said that, it is important to note that not only has the number of cases relating to this topic continued to grow, but also, at the same time, there has been an increase of dissenting opinions being appended to arbitral awards. This shows the existence of different understandings on the correct interpretation to be given to MFN clauses.

For example, if some decisions follow the general logic of the *Maffezini* case when referring that dispute settlement provisions do fall within the scope of MFN treatment; other decisions are led by the *Plama v. Bulgaria* case which makes the opposite assumption.

Therefore, the survey conducted by the Commission on the various trends and approaches to the interpretation of MFN clauses is in its own right an already good outcome.

Mr. Chairman,

There is a limit to the degree of harmonization and uniformity that one can expect when it comes to the interpretation of MFN clauses. As such, a forced uniformization of practice and jurisprudence without any support in practice could result in a solution devoid of content.

The Commission, by not forcing ideal outcomes, will be providing helpful assistance to States, International Organizations, investors, courts and tribunals and, therefore, contributing to the only possible, but necessary certainty and stability to investments.

Thank you, Mr. Chairman.