

# **70<sup>th</sup> Session of the General Assembly**

Item 83

## **Report of the International Law Commission on the work of its sixty-seventh session**

### **Identification of customary international law**

(Chapter VI of the Report)

### **Crimes against Humanity**

(Chapter VII)

### **Subsequent Agreements and subsequent practice in relation to the interpretation of treaties**

(Chapter VIII)

### **Statement by**

Ms. Rita Faden

Director

**Department of Legal Affairs**

**Ministry of Foreign Affairs**

**Portugal**

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Mr. Chairman,

Portugal continues to follow with great interest the topic “**Identification of customary international law**” included in the programme of work of the ILC in 2012 and commends the Special Rapporteur, Mr. Michael Wood, for the work conducted so far.

This is a topic of high practical value for legal advisors and practitioners around the world and we welcome the intention of the ILC to adopt next year the Draft Conclusions and the commentaries thereto. A set of practical and simple conclusions, with a commentary, aiming at assisting in the identification of rules of customary law seems to be the right way to proceed, though we agree with the comments made in the debate in the ILC that cautioned against oversimplification and some draft conclusions would thus benefit from further specification.

Mr. Chairman,

Portugal would like to offer some comments regarding certain Draft Conclusions proposed in the Report of the Special Rapporteur, as well as in the outcome of the Drafting Committee. We will refer to the numbering used in the Text of the Draft Conclusions provisionally adopted by the Drafting Committee.

Concerning the relationship between the two constituent elements of custom and Draft Conclusion 3 on “Assessment of Evidence”, we would tend to agree with the view that there could be a difference in application of the two-element approach in different fields or with respect to different types of rule, consequently requiring further exploration of the respective weight of the two elements. It could also be specified that, although each element – general practice and *opinio juris* – has to be separately ascertained, the same material can be evidence of both elements, as it was stated by the Chairman of the Drafting Committee, and that there is no necessary sequence between them.

With regard to Draft Conclusion 12 on “Resolutions of International Organizations and Conferences”, it would be useful to detail in which circumstances, even if only in an indicative manner, such resolutions may be evidence of customary international law or contribute to its development. At the same time, it seems too categorical to include in the draft conclusion, as it was proposed by the Special Rapporteur, the sentence “they cannot, in and of themselves, constitute” custom, and we

would favor its deletion. In this respect, it seems more acceptable the formulation that came out of the Drafting Committee for paragraph 1, but we still would prefer the deletion of this paragraph and believe that paragraphs 2 and 3 are sufficient to characterize the significance that resolutions of international organizations have for the identification of customary international law.

In what concerns Draft Conclusion 15 on the issue of “Persistent Objector”, we concur with the Draft Committee in the characterization of this category as a matter of “opposability” rather than of “the binding character” of the customary rule. However, our view is that it should be specified that the “persistent objector” status is not compatible with norms that have a *jus cogens* character. Also, concrete examples should be provided in the commentary to substantiate the rule, as it was mentioned in the Statement of the Chairman of the Drafting Committee.

Turning now to “Particular Custom” and Draft Conclusion 16, we support the view taken by the Special Rapporteur to include a draft conclusion in this matter. Particular custom could be better specified as referring to regional, local or particular custom, thus we welcome the re-drafting by the Drafting Committee. We would also be of the opinion that the assessment of the two elements may be differentiated from what is proposed for general custom. For instance, in the *Right of Passage over Indian Territory*, the ICJ referred to a “long continued practice” and not to a “general practice”, so we share the view of the members of the Drafting Committee who wondered if the qualifier “general” (with respect to the constituent element of practice) was necessary in the context of particular custom.

Mr. Chairman,

As a final remark, on balance, we feel that the Draft Conclusions give more prominence to the issue of “evidence” rather than to the one of “formation” as envisaged on the original title of the topic which was “Formation and evidence of customary international law”. In our view, more emphasis should be given to the aspect of formation, namely with regard to the two elements of practice and *opinio juris*. As we already said in previous occasions, through the description of how customary law is formed, one will be better able to identify a methodology which will allow the identification of 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,

Allow me now to turn to Chapter VII of the Commission's Report devoted to **the topic "Crimes against humanity"**.

I would like to begin our intervention on this topic by commending the Special Rapporteur, Mr. Sean Murphy, for his comprehensive study based on the already existing regimes and on the jurisprudence of several courts and tribunals presented in his report. We believe it gave a good overall view of the background on this subject, but we would like to offer some comments on the on-going work of the Commission regarding this topic.

Mr. Chairman,

Crimes against humanity are one of the most serious crimes of international concern and States should make every possible effort to prevent and punish them.

There were some valid points presented towards the possibility of drafting a convention regulating crimes against humanity, as there are for other crimes of similar nature, particularly when it comes to establishing rules for cooperation and legal assistance between States and allowing for the prosecution of these crimes when a State or other organizations, such as the International Criminal Court, do not have jurisdiction over them. Such an instrument could be one more step to fighting impunity and ensuring accountability where these crimes are concerned.

However, we share the view that the study of this topic should be addressed with some caution and that it must take into account the already existing legal framework dealing with crimes against humanity.

The work developed must avoid entering into conflict with the regimes in place, in particular with the Rome Statute, but rather seek to complement them.

Mr. Chairman,

On a brief note regarding the draft articles presented by the Commission and in light of our comments, we welcome the use of the definition of crimes against humanity contained in Article 7 of the Rome Statute with the necessary changes in the proposed draft article 3. As stated in the Commission's report, such definition has been accepted by more than 120 States and it reflects how these crimes are understood today.

To conclude my intervention on this topic, to which Portugal attaches great importance, let me assure Mr. Chairman that Portugal will continue to follow with great interest the work of the Commission on this matter.

Mr. Chairman,

Allow me to turn, now, to the **topic ‘Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties’**. Portugal would like to commend the Special Rapporteur, Mr. Georg Nolte, for his third report which contains useful guidance on the role of subsequent agreements and subsequent practice regarding the interpretation of treaties which are constituent instruments of international organizations.

The discussions held by the Commission on this topic at its sixty-seventh session raised some technical legal questions, given the specific problems of interpretation unveiled by this particular type of treaties.

Although Article 5 of the Vienna Convention on the Law of Treaties reflects the view that constituent instruments of international organizations are different from other bilateral and multilateral treaties, it clearly confirms that all its provisions, including the rules of interpretation foreseen in Articles 31 and 32, are applicable to this kind of instruments, without prejudice, however, to the relevant rules of the organization.

Taking into account this legal framework, we are of the opinion that some further consideration should be given to the distinction between the concept of ‘subsequent practice’ of the parties pursuant to Article 31 (3) (b) and the concept of ‘established practice’ relevant to the rules of an international organization, as referred to in Article 5.

The connection between these concepts is revealed by the fact that established practice can influence the preconditions for and the significance of subsequent practice in the interpretation of the constituent instruments of international organizations.

Mr. Chairman,

Although only briefly mentioned in the comments made to draft conclusion 11, we believe that there is a need to further look into these distinct but interconnected concepts, with a view to clarify whether and when a practice represents a manifestation of the Vienna Convention’s rules of interpretation or whether and when it reflects a special or different rule of interpretation that is applicable to the constituent instruments of international organizations.

To conclude, Mr. Chairman, let me reiterate that this topic is of great importance to Portugal and that we will follow closely the Commission’s approach on this issue in its forthcoming work.

Thank you, Mr. Chairman.