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

Protection of environment in relation to armed conflicts
(Chapter IX of the Report)
Immunity of State Officials from foreign criminal jurisdiction
(Chapter X)
Provisional Application of treaties
(Chapter XI)

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Mr. Chairman,

Portugal continues to follow with great interest the topic "**Protection of the Environment in relation to Armed Conflict**s" included in the programme of work of the ILC in 2013 and commends the Special Rapporteur, Ms. Marie Jacobsson, for the work conducted so far.

This is a topic that has particular relevance in a world where more and more armed conflicts affect the environment. This being so, we welcome the drafting of principles that are aimed at enhancing the protection of the environment in relation to armed conflicts through preventive and remedial measures, as well as the minimization of damage to the environment during such conflicts.

The existing treaty rules of international humanitarian law that address the protection of the environment during armed conflict are limited, especially in what concerns non-international armed conflicts and thus, the outcome of the work of the Commission – regardless of its future form that should be considered at a later stage – may have an important component of progressive development.

Mr. Chairman,

The ICRC study on "Customary International Humanitarian Law" of 2005, suggests as customary norms on this matter rules 43, 44 and 45. These rules reaffirm the application of the general principles on the conduct of hostilities to the natural environment, i.e. the principles of distinction, military necessity and proportionality, the obligation to take all feasible precautions to avoid or minimize damage to the environment and the precautionary principle. They also stress that the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited and that the destruction of the natural environment may not be used as a weapon.

The ICRC study indicates that some of these rules are arguably also applicable in relation to non-international armed conflicts. The possible customary law approximation of the fundamental principles applicable both to international and non-international armed conflicts is an important element for the enhancement of environmental protection in the context of current conflicts, and should therefore be taken into account by the ILC.

However, the impression that the text of the draft principles is weakening existing treaty law should be avoided. We fear that Draft Principle II-1/2, that was not contained in the proposals of the Special Rapporteur and was added by the Drafting Committee, that refers that "care shall be taken to protect the [natural] environment against widespread, long-term and severe damage" could weaken the current law, namely Articles 35/3 and 55/1 of Additional Protocol I to the Geneva Conventions. It is lacking the reference contained in those articles to the prohibition to employ means and methods of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment. Therefore, we would recommend that this principle be reviewed to be in line with the above mentioned provisions or that the prohibition of use of methods or means of warfare which may cause such damage to the environment may be included in a separate draft principle.

Moreover, it would be a good occasion to discuss – as it was suggested during the debate at the ILC - in more precise terms, perhaps in the commentary, what should be meant by "widespread, long-term and severe damage" to the environment, since this threshold is also used in the ICC Statute in relation to war crimes as well as in the ENMOD Convention of 1976.

Monsieur le Président,

Nous souhaitons à présent aborder le sujet de **l'immunité de juridiction pénale étrangère** des représentants de l'État, tout en remerciant la Rapporteuse spéciale, Mme Escobar Hernández, d'avoir élaboré le quatrième rapport sur ce sujet.

Dans le même esprit que les remarques faites au cours des années précédentes, permettez-nous de réaffirmer notre conviction que l'approche de ce sujet doit refléter un engagement envers certains droits et valeurs juridiques dont il faut tenir compte. Les solutions proposées doivent démontrer le caractère exceptionnel du régime des immunités et être fondées sur une évaluation juste, équitable et raisonnable, de manière à traduire juridiquement le compromis entre la sauvegarde du rôle des États et la reconnaissance de la dignité de l'individu au sein du système international.

Le Portugal estime que la distinction entre l'immunité *ratione personae* et l'immunité *ratione materiae* est essentiellement méthodologique, car les immunités sont de nature fonctionnelle et ne sont appliquées que dans la

stricte limite et à propos de certaines catégories d'actes justifiant cette forme de protection.

La définition fondamentale de la notion de «l'acte accompli à titre officiel», introduite dans le rapport de la Rapporteuse spéciale et faisant cette année l'objet des discussions et d'étude de la Commission du Droit International, est donc centrale compte tenu du sujet qui nous occupe, puisqu'en dernière analyse, elle déterminera le *ratio* du régime de l'immunité *rationae materiae*.

A propos des projets d'articles présentés cette année, à savoir les projets d'articles 2 f) et 6, nous notons avec satisfaction que le texte proposé par le Comité de rédaction a évolué au profit de la clarté et de la rigueur conceptuelles.

Monsieur le Président,

Il convient de souligner l'analyse exhaustive des critères d'identification de la notion de «l'acte accompli à titre officiel», entreprise par la Rapporteuse spéciale, en recourant à l'examen de la jurisprudence et de la pratique conventionnelle pertinentes, ainsi qu'aux travaux antérieurs de la Commission du Droit International, en particulier les articles sur la responsabilité de l'État pour fait internationalement illicite. Suivant la Rapporteuse spéciale, quelques précautions s'imposent pour identifier les critères normatifs de la notion de «l'acte accompli à titre officiel».

En ce qui concerne les actes susceptibles d'affecter la portée de l'immunité, tels que les actes *ultra vires*, les actes de *jure gestionis* et les actes accomplis dans son propre intérêt, nous émettons quelques réserves concernant leur qualification de limite et/ou d'exception, puisqu'à notre avis, ils devraient être envisagés dans le cadre du régime général de la responsabilité, c'est-à-dire en dehors du régime exceptionnel des immunités.

Enfin, quant aux crimes internationaux, soit du point de vue des principes éthiques et normatifs sous-jacents, soit du point de vue du besoin de les articuler avec les régimes internationaux existants, entre autres le Statut de Rome de la Cour pénale internationale, on considère qu'il est essentiel de les traiter de façon individualisée, en marge du régime des immunités, dans un article autonome.

Monsieur le Président,

Pour conclure notre intervention, nous aimerions -une fois de plus- manifester notre soutien à l'adoption d'une approche engagée et rigoureuse de ce sujet, lequel revêt une importance fondamentale pour la communauté internationale et dont l'évolution nous continuerons à suivre avec grand intérêt.

Mr. Chairman,

I will now turn to the topic **"Provisional Application of Treaties**" included in the programme of work of the ILC in 2012 and Portugal commends the Special Rapporteur, Ambassador Gómez-Robledo, for the work conducted so far.

It is a topic that Portugal continues to follow with great interest, of important practical value for legal advisors around the world and also one of considerable political interest, given the importance of the Law of Treaties and all its aspects for International Law and International Relations, and the increasing need for rapid responses to certain events or situations that are not fully compatible with the sometimes slow process of entry into force of international treaties.

The work of the ILC on this issue, however, should not go beyond Article 25 of the Vienna Convention on the Law of Treaties of 1969, specially having in mind that many States have domestic restrictions or requirements – some at constitutional level – concerning the acceptance of provisional application of treaties, though it is recognized, as mentioned above, that in certain instances this could be a useful tool.

Mr. Chairman,

Portugal would like to make a few remarks concerning some of the Draft Guidelines presented by the Special Rapporteur on his third report, as well as on the scope of the topic and final form of the work of the Commission.

Concerning Draft Guidelines 1 and 2, since we believe that one of the objectives of the ILC on this topic should be to clarify Article 25 of the Vienna Convention, it would be of particular interest to develop the meaning of the sentence "or when they have in some other manner so agreed". Draft Guideline 2 is helpful in this regard, but again it could be more explicit what should be meant by "any other arrangement between the States or international organizations". At the same time, the sentence "internal law of the States or the rules of the international organizations do not prohibit such provisional application", could be formulated in another

manner, since this does not seem to reflect correctly the domestic provisions and practice of States with regard to provisional application and the Vienna Convention itself is silent in this respect, as it was also noted in the discussion in the ILC.

Turning to Draft Guideline 4, we share the view of the Members of the Commission that considered that the legal effects resulting from provisional application should be specified, namely that the provisional application does give rise to legal obligations, as if the treaty was in force for the signatories applying it.

Mr. Chairman,

Turning now to the scope of the work to be undertaken under this topic, we would like to offer two remarks. The first one concerns a possible comparative study of domestic provisions and practice on provisional application. In spite of the fact that we understand the complexities of this endeavor, as we have had the chance to say already before this body, the practice of State is extremely relevant and there are important differences in domestic law from State to State regarding the possibility of accepting the provisional application of treaties. A broad approach to be taken by the Commission in order to respect the diversity of solutions that exist at the national level presupposes some level of knowledge of such solutions. Thus, it would be certainly useful that States themselves contribute with examples of their practice and domestic regime and that the ILC conducts a comparative study of relevant domestic law. It would be likewise useful to include in the study the practice of regional international organizations, as suggested by the Special Rapporteur. The European Union, for instance, has an extensive practice of provisional application, taking into account the different national regimes of its Member States, and thus constitutes a helpful example on how to reconcile the recognized interest of a rapid application of an international agreement, with the need to respect the domestic requirements of the involved States.

Mr. Chairman,

Our last remark goes to the final form of the work of the ILC on this topic. Portugal has taken already the view that the aim should be to clarify the legal regime of provisional application contained in the Vienna Conventions on the Law of Treaties. Thus, the objective should remain the development of a set of draft guidelines, possibly with model clauses.

I thank you Mr. Chairman.