



PORTUGAL

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Statement by

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Agenda item 81

Report of the International Law Commission

Cluster I

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Monsieur le Président,

Puisque c'est la première fois que je prends la parole, permettez-moi tout d'abord de vous féliciter pour votre élection en tant que président de la Sixième Commission.

C'est avec grand plaisir que le Portugal participe au débat sur le premier rapport de la Commission du Droit International après l'élection, l'année dernière, pour le quinquennat 2017-2021. Je voudrais profiter de cette occasion pour féliciter tous les membres de la Commission, et en particulier souhaiter la bienvenue aux nouveaux membres.

Permettez-moi également de remercier le Président de la Commission, Mr. Nolte, pour la présentation du rapport sur les travaux de la Commission au cours de sa soixante-neuvième session.

Dans l'intervention d'aujourd'hui, nous allons commencer par faire quelques remarques générales sur le travail de la Commission. Puis, nous aborderons les sujets «crimes contre l'humanité» et «l'application provisoire des traités». Dans les prochains jours, nous passerons en revue les autres matières du rapport selon les *clusters* proposés.

Monsieur le Président,

Le Portugal a suivi avec beaucoup d'intérêt les travaux et les résultats de la soixante-neuvième session de la Commission du droit international. Ce fut une session intense ayant à son ordre du jour d'importants points et au cours de laquelle des progrès ont été faits, en particulier en ce qui concerne le sujet des «crimes contre l'humanité» — dont une première lecture a été conclue — et celui de «l'immunité de juridiction pénale étrangère des représentants de l'État».

En ce qui concerne ce dernier sujet et la question plus vaste des méthodes de travail de la Commission,, nous sommes d'avis que l'idéal serait que la Commission s'efforce de poursuivre son travail sur la base du consensus. Toutefois, le souhait d'un consensus ne devrait pas bloquer la Commission et l'empêcher de faire avancer ses travaux. Celle-ci, comme les autres organes subsidiaires de l'Assemblée générale, a des règles claires en matière de vote. Voter n'est donc pas un échec, mais tout simplement une façon de progresser conformément au mandat conféré à la Commission et à ses propres règles de procédure.

Pour ce qui est de chaque projet, il appartient en tout état de cause à l'Assemblée Générale de décider de ce qu'il convient de faire avec le travail qui lui a été présenté par la Commission.

Monsieur le Président,

La Commission continue à identifier de nouveaux sujets susceptibles d'être inclus dans son programme de travail. Ceci est bien la preuve que la Commission a encore des matières de droit international à explorer. À ce propos, nous prenons bonne note de l'inclusion du sujet «la succession d'États en matière de responsabilité internationale» dans le programme de travail de la Commission.

Le Portugal note avec satisfaction l'inclusion de deux sujets les «principes généraux du droit» et la «preuve devant les Cours et Tribunaux internationaux» dans le programme de travail à long terme de la Commission. Nous considérons que le sujet «principes généraux du droit» est suffisamment mûr pour faire partie du programme actif de la Commission – et apportera une contribution importante à ses travaux de longue date sur les sources du droit international –; Nous souhaitons toutefois réserver notre position sur d'autres sujets jusqu'à ce que plusieurs propositions soient faites pendant ce nouveau quinquennat.

Monsieur le Président,

Pour conclure cette partie de notre intervention, nous tenons à saluer le travail fondamental du Secrétariat en vue d'aider la Commission du droit international à accomplir son important mandat.

Mr. Chairman,

I will now address Chapter IV of the Commission's Report devoted to the topic "**Crimes against humanity**". I would like to begin by commending the Special Rapporteur, Mr. Sean Murphy, for his detailed and comprehensive report. Portugal also commends the Commission for having completed the first reading on this topic.

Crimes against humanity are particularly heinous acts that put into question human dignity at a large scale, thus shocking the conscience of humanity. That is why Portugal

continues to follow the work of the Commission on this topic with great interest and with high expectations regarding its outcome as a future international binding instrument.

Mr. Chairman,

Portugal believes that the draft articles already presented by the Commission provide a solid and strong basis for the discussion about a future convention covering both the substantive and procedural aspects of this topic.

Nonetheless, we would advise the Commission to proceed carefully when considering adopting solutions that have proved to be successful for other types of crimes. We should avoid falling into the temptation of simply transposing already existing regimes that were not designed for the specific context and legal nature of crimes against humanity. This is an issue that may have to be revisited upon the second reading of the draft articles

Mr. Chairman,

Allow us to offer a brief comment on the draft articles presented to us this year. Regarding draft article 12 "*Victims, witnesses and others*", we note that the current drafting deals both with the different participants in the criminal proceedings – victims, witness and others – and with different stages of the proceedings – namely the participation in the proceeding itself and the award of compensations to the victims.

Even though the heading of draft article 12 seems to allow for an extensive coverage of the subject, it seems to us that this provision would benefit if the question of compensations were to be addressed in a separate article. In our view, it would make the text clearer as these two stages of the proceedings would be treated separately. Furthermore, we consider that a single article dealing solely with the issue of compensations would give more emphasis to the rights of victims.

Mr. Chairman,

Portugal will continue following with utmost interest the work of the Commission on this topic. Our hope is that this work will be an important contribution to the fight against impunity, ensuring accountability where crimes against humanity are committed. Allow

me to conclude my comments on this topic by informing that Portugal will submit in due course the written comments and observations on the draft articles, as requested.

Mr. Chairman,

I will now turn to the topic **“Provisional Application of Treaties”**.

Portugal would like to commend the Special Rapporteur, Mr. Gómez-Robledo, for the work conducted so far. We also wish to thank the Secretariat for the useful Memorandum on State practice in respect of bilateral and multilateral treaties that provide for provisional application, deposited or registered in the last 20 years with the Secretary-General.

Mr. Chairman,

Portugal understands the pressing need for swift and flexible solutions and responses in today's international social relations. This includes the need for an almost instant production of effects of treaties, especially in cases of multilateral treaties with a high number of contracting parties.

The 1969 and 1986 Vienna Conventions on the Law of Treaties have tried to cope with these concerns. Indeed, the aim of article 25 of the Vienna Conventions was to allow some degree of flexibility concerning the date of production of effects of treaties.

However, as we have stated in previous occasions, the focus of the Commission's work should be to clarify the legal regime of provisional application contained in the Vienna Conventions, without any temptation of widening its scope.

Moreover, such clarification cannot, in any case, compel States to change their national constitutional practices. It must be recalled that the Vienna Conventions only open the possibility of choice of provisional application – they do not impose it. The ultimate decision to provisionally apply a Treaty lies with the concerned State or International Organization.

Against this background, Portugal considers that it would be important that the voluntary nature of the provisional application be further emphasized in the general commentary.

Mr. Chairman,

We read with great interest the Memorandum prepared by the Secretariat. We would like to suggest that this information be supplemented by a comparative study of domestic provisions and practice on provisional application, as there is still little information available on national practice.

We understand the complexities and the ambition of this endeavor. However, the practice of State is extremely relevant and there are important differences in domestic law from State to State on the provisional application that cannot be overlooked.

Mr. Chairman,

Portugal welcomes, in general, the revised draft of Guidelines 1 to 11. They show a consistent and practical approach to the topic. Nevertheless, we would like to take this opportunity to comment on Guideline 11 dealing with the agreement to provisional application with limitations deriving from internal law. This is one of the questions States come across more frequently.

We consider that the drafting of the guideline can be improved in order to better reflect the voluntary nature of the mechanism of provisional application. As it stands, a less cautious interpreter can be misled to conclude that provisional application is the default rule, whereas the prerogative of the States to accept it or not is a special or even an exceptional situation. We all know that this is not the case.

This imprecision is somehow softened by point (2) of the Commentary, when it clarifies that "the guideline recognizes the flexibility of a State or an international organization to agree to the provisional application of a treaty or part of a treaty in such a manner as to guarantee that such an agreement conforms with the limitations derived from their internal provisions". This sentence is the core of Guideline 11 and Portugal considers that this idea should be better reflected on the text of the guideline.

Thank you, Mr. Chairman.