69th Session of the General Assembly

Item 78

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

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

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

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(Chapter XIII of the Report)

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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 Law[2] where practice of non-State actors is referred to. In another example, in the Aminoil case[3], the arbitral tribunal considered that private companies can indeed contribute to the formation of customary international law.

Mr. Chairman,

is, in our view, too closely attached to a mere voluntaristic approach that echoes the decision in the Lotus case of 1927[4]. 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*

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,

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.
environmental protection are interdependent and i [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.

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.

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

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

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
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 ti

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

what is already provided for in the 1969 and 1986 Vienna Conventions, there is no room for progressive development.

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.