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Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions: (item 79)

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I have the honour to speak on behalf of the five Nordic countries, Denmark, Finland, Iceland, Sweden, and my own country Norway. In keeping with the work program for the debate of the report of the ILC, I will in this statement address the topics of Immunity of State officials from foreign criminal jurisdiction, Provisional application of treaties, Formation and evidence of customary international law, the obligation to extradite or prosecute and the Most-Favoured-Nation clause.

Immunity of State officials from foreign criminal jurisdiction

Mr Chairman,

As we address the issue of immunity of State officials from foreign criminal jurisdiction, we would again like to thank Mr Roman Kolodkin, the former Special Rapporteur, for having submitted valuable analytical contributions to the discussion of this important and challenging topic. We would also like to congratulate Ms Concepción Escobar Hernández on her appointment as Special Rapporteur to this topic of the Commission. We welcome her Preliminary Report, which usefully summarises the debate to date and which also identifies topics that require further consideration.

(Check against delivery)

We wish Ms Hernández the best of success with the task of building on the important foundations laid by Mr Kolodkin.

Mr Chairman,

The concept of sovereignty is closely linked to that of equality of States. International law reflects these principles in its prescription to States not to claim jurisdiction over another sovereign State.

First of all, and bearing in mind the principles of sovereignty and equality of States, it can be noted that customary rules regarding immunity develop in line with what is necessary and functional in the exercise of international relations. We recall in this regard that customary law is not static; it may change in line with the practice of States and their recognition of it.

We note that the International Court of Justice concluded in February 2012, that under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict[1]. The question whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State, was not in issue on that occasion. We believe it is important to distinguish between the two.

We welcome the Preliminary Report's emphasis on the functional basis for immunity (paragraph 58). At the same time, we recognise that immunity *ratione personae* enjoyed by a limited number of persons is status based and that, when considering the current state of international law, account should be taken of the *dicta* in the 2002 *Arrest Warrant* case.[2] We will actively follow developments on this topic.

As regards immunity *ratione materiae*, we favour further studies of the distinction between acts and situations that require immunity for the purpose of allowing States to act freely on the inter-State level without interference, and those where immunity is not needed for this purpose.

We agree with those who do not find it helpful to consider immunity of States officials as "absolute". The Preliminary Report of the Special Rapporteur (paragraphs 64 and 68) raises the question of "exceptions" to immunity, both "ratione personae" and "rationae materiae".

The Nordic countries are of the view that, as regards countering impunity for the most serious crimes that concern the international community as a whole, no state officials should be able to shield behind a veil of immunity. While we recognise that there may be different views as regards the available evidence for the identification of customary international law on this account, there is nevertheless a need to fully take into consideration landmark treaties and international jurisprudence in this field. In our address here last year, we suggested that the scope of both categories of immunity should be examined in light of these developments. They reach back at least to the

[1] *Jurisdictional Immunities of the State*, (Germany v. Italy: Greece Intervening), Judgment 3 February 2012, paragraph 91

[2] Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v. Belgium, ICJ Reports 2002, para. 52-55.

Nuremberg and Tokyo tribunals, with the latest milestone being that the International Criminal Court in 2012 handed down its first sentence. While consideration of the impact of immunity from international criminal tribunals was excluded from the Commission's work by the previous Special Rapporteur, legal developments to which such tribunals contribute cannot be ignored in our context. This is compounded by the weight given to national prosecutions, as the preferred action when possible, rather than solely relying on international criminal justice institutions. We believe that these developments should be also taken into account in further discussions of the current state of the law of immunities. Crimes such as the commission of genocide cannot, in our view, be considered as an "official act". It is not immediately easy to identify any real functional need for upholding the immunity of State officials, as regards prosecutions of such crimes.

Mr Chairman,

As can be seen from the Report of the International Law Commission's Sixty-fourth session (paragraph 115-116), there is an on-going debate over which categories of persons should enjoy immunity *ratione personae*. A central question is whether such immunity should extend beyond the "troika" and, if so, how far. When discussing which categories of State officials should enjoy immunity *ratione personae* it might bring us one step further if we consider whether such possible immunity for officials outside the "troika" should be limited to certain situations only, allowing us to widen somewhat the group of State official who could enjoy immunity. We would like to raise the question as to whether restricting immunity *ratione personae* linked to the status of persons included in the so-called "troika" fully takes into account the more recent developments of internationalization of state activities, whereby certain State officials actually and to a significant extent carry out the role of "chef de la diplomatie" under difficult circumstances, for instance as regards handling of the current financial crisis. At the same time we are open for further consideration as to whether such immunity for this group should be limited to official visits or also include a protection against trial processes in absentia.

Mr Chairman,

The Preliminary Report identifies "exceptions" to immunities among the issues where further debate is needed. We are prepared to contribute to fruitful exchanges on the matter.

Mr Chairman,

We would like to caution, as we have before, against "any constructivist approach that would not take into full account important developments of international law, together with the need to promote the latter's coherence, by integrating important principles that have evolved over time". In this regard, we welcome the Preliminary Report's reiteration (paragraph 77) that the Commission has a "mandate to pursue simultaneously the codification and progressive development of international law".

Another issue that is singled out in the Preliminary Report (paragraph 67) is the possible correlation between a State invoking immunity for one of its officials and the assumption of responsibility for any corresponding international wrongful act committed by that official. The former Special

Rapporteur's Second Report commented that "there are no objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other" (paragraph 94(c)). We maintain, as in our previous address, that there may be reason to distinguish between a presumption for such State responsibility and the final determination of the latter; the purposes behind the two sets of rules are indeed quite different.

Mr Chairman,

We have noted with appreciation that the Commission in its annual report has posed two questions where it in particular welcomes comments and observations from member States. These are whether the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences, and, if so, how they are treated differently, and what criteria that are used in identifying the persons covered by immunity ratione personae. The Nordic countries will, in due course, offer their points of view on these specific issues, as invited by the Commission.

In order to contribute to the effectiveness of the deliberations in the Sixth Committee, the Nordic countries would like to refer to the more elaborate statement made last year by the Nordic countries on this important topic in the Sixth Committee, as regards certain elements that we did not wish to repeat at this Session.

In concluding on this topic, Mr Chairman, let me express our support for the ILC's continued work in this field. This topic is both complex and challenging. We believe the reports submitted by Mr Kolodkin form a solid basis for the Commission's continued endeavours in this respect. We look forward to working with Ms Hernández, and promise to remain constructively engaged with the Commission's work.

Provisional application of treaties

Mr Chairman,

I will now address the topic of Provisional application of treaties. The ILC decided this year to include this topic in the current programme of work and appointed Mr Juan Manuel Gómez-Robledo as Special Rapporteur for the topic. Divergent views were expressed last year by State representatives in the Sixth Committee on the appropriateness and outlining of this new topic. Against this background we find it helpful that the Commission has held informal consultations on the basis of preliminary elements prepared by the Special Rapporteur together with the original syllabus prepared by Mr Giorgio Gaja. We look forward to the first report by the Rapporteur.

With respect to the specific questions related to the relation between Articles 18 and 25 of the Vienna Convention on the Law of Treaties we agree with those views expressed in the Commission that provisional application under Article 25 goes beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force. These two different legal regimes

should be treated as such and would not in our view give rise to further elaboration. The question of which organs were competent to decide on provisional application and the relation to Article 46 of the Vienna Convention would not in our view deserve in-depth attention because of the constitutional nature of the question. Among the elements mentioned in the informal discussions that could gain from further clarification were the exact meaning of provisional application of a treaty and the nature of obligations created by provisional application.

Considerable State practice on the provisional application of treaties has formed over the years. Such state practice cannot remain a mere fact but should be given relevance to in the work of the Commission.

It is obvious that at this initial phase of deliberations of this new topic it is premature to try to anticipate the desired outcome. Indication by the Special Rapporteur that the Commission should not aim at changing the regime of provisional application of treaties in the Vienna Convention provides, however, an appropriate starting point.

Formation and evidence of customary international law

Mr Chariman,

As I turn to the topic of Evidence of customary international law, aallow me first of all to commend the ILC and its Special Rapporteur, Sir Michael Wood, for the comprehensive and useful background note and careful preparation of this agenda item.

As recently highlighted at the high level meeting held in the General Assembly, international relations must be governed by the rule of law. At the same time, this requires knowledge and certainty about the very basic question: "Which rules apply?" To this end customary international law, as a source of law, poses some particular challenges. Typically, rules of customary international law cannot easily be looked up in a statute or a collection of case-law.

The process of identifying the mere existence of a rule of customary international law can be both difficult and challenging even for judges, scholars and practitioners well trained in international law - and is even more difficult for those, who are not, including judges at the national level facing issues of international law.

For this reason, it is most welcome that the ILC now engages in analysis of the formation and evidence of customary international law. We agree with Special Rapporteur Michael Wood in his ambition to identify certain conclusions with commentaries or guidelines, which could be a valuable tool for practitioners facing questions of customary international law.

Mr Chairman,

Looking at the title of the agenda item, we find that both the issue of "formation" and that of "evidence" are highly important and deserve renewed attention.

There are many relevant aspects of "the formation". During the past decades - or rather through most of the 20th century – we have witnessed a massive increase in the use and importance of treaties and conventions. Less attention has been devoted to the question of customary international law; though this category of law is as important as ever.

To this end, it deserves to be mentioned that one of the reasons for taking a careful look at customary international law is the importance of the relationship and interplay between treaties and customary international law. Attention should be given to the mutual influence and interaction frequently exercised by the two.

The North Sea Continental Shelf Case before the ICJ illustrated some of the challenges in settling the questions of how and when a positive rule is in fact equal to a rule of customary international law.

The court referred to the potential situation where a treaty-based rule either "reflects", "crystallises" or "generates" a customary rule. By making this refined distinction between the codification of an existing customary rule and the emergence of a custom as a result of a multilateral agreement, the court pointed to the delicate correlation between treaties and customs as bodies of law which are capable of mutually affecting one another.

This interplay between treaty and custom may have gained increased importance due to the growing body of international treaties. While there is broad consensus that a non-State Party is not bound by a convention that does not reflect customary international law, the situation may in reality be said to be reversed where a convention in fact reflects, crystallizes or generates an international custom. In that case, the treaty provision may become a reflection of customary international law which – as such – is also binding on a State that is not party to the treaty.

An example of such a deep transformation that is commonly being cited is the UN Convention of the Law of the Sea (UNCLOS) and its significant influence on customary international law. While the latter's more precise content based on UNCLOS is in some cases still being discussed, there is no doubt on the convention's decisive impact on the consolidated body of law that has emerged in this field. Incidentally, it is also noteworthy that customary law was also significantly influenced by early or precursory processes of crystallization already at the stage of drafting of UNCLOS. By this we refer to the universally acceptable formulation of certain textual elements in the negotiations at the Third Law of the Sea Conference, particularly in connection with the emergence in 1977 of an Informal Composite Negotiating Text and the shared understanding of certain conceptual underpinnings and components of a single comprehensive and unified international regime for the modern law of the sea.

Mr Chairman,

We find that it would be interesting with further study on the interplay between the intergovernmental work of the United Nations and the emergence of new rules of customary international law. In some cases, views regarding legal norms are expressed in multilateral work in acts of a non-binding nature, such as statements of Heads of States and governments at UN

Summits and Conferences, during the opening general debate of the General Assembly or through the negotiation of resolutions in the Assembly and its thematic discussions on various issues, including in this committee.

Mr Chairman,

Another interesting topic relates to the emergence of customary international law based on the development of norms and rules in national legal systems caused by interpretations of international legal rules, including in the field of human rights. An example is the role played by certain landmark judgments by national courts in the early development of international rules of humanity as regards the duty to render assistance to persons in distress at sea, later included in international legal instruments and ultimately reflected in UNCLOS.

Another issue is related to the question of the legality of the death penalty. This question was addressed by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in his interim report of 9 August 2012. Based on Court rulings and statements by the Legislator in a number of countries the report asks whether there is an evolving standard, whereby States and judiciaries consider the death penalty to be a violation per se of the prohibition of torture or cruel, inhuman or degrading treatment. The Rapporteur acknowledged that the review of precedents to determine the existence of such a norm as an already established custom fell beyond the capacity of the interim report. Nevertheless he was convinced that even if a customary norm prohibiting the death penalty under all circumstances had not fully emerged already, it was at least in the process of formation.

Mr Chairman,

Regarding the question of "evidence" of customary international law the usefulness of a practical tool for guidance is obvious. In developing such a tool – possibly in the form of conclusions with commentaries – it is important not to limit the possible sources unwarranted. The whole purpose of the exercise must be to identity all forms of evidence and possibly give guidance on methodology.

Aut dedere aut judicare

Speaking in relation to the topic of Aut dedere aut judicare, the Nordic countries are concerned about the relatively slow progress made by the Commission on this important issue. The fight against impunity for perpetrators of serious international crimes is a principal legal policy objective not only of the Nordic governments, but also of the international community. The ICJ judgment in the case *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal) of 20 July 2012 confirms the key role the obligation *aut dedere aut judicare,* together with the closely linked principle of universal jurisdiction, plays in the enforcement of international criminal law and in preventing and countering impunity.

We have noted that some members of the Commission consider the main stumbling block to progress in this area to be the absence of basic research on whether or not the obligation to prosecute or extradite has attained customary law status. Codification and further clarification of applicable international law on this issue would help to ensure maximum effect and compliance with existing rules, and would therefore in our opinion be of great importance. We have suggested that the Commission work more systematically on the identification of the relevant core crimes.

At the same time, we are aware that there may be divergent views on whether the obligation to prosecute or extradite has attained a customary law status. Unfortunately, the ICJ judgment of 20 July 2012 did not address this question, due to the Court's lack of jurisdiction. Taking both progressive development of international law and its codification into account, the Nordic countries, however, agree with the members of the Commission that have pointed out that any absence of a clear determination or agreement on the customary nature of the obligation cannot be regarded as an insurmountable obstacle to further consideration of the issue. In conformity with the common interest of all States in the suppression of international crimes, the Nordic countries reiterate that, if necessary, and on a more informed basis, we would be ready to discuss further steps towards progressive development of international law in relation to the obligation to prosecute or extradite.

Most-Favoured-Nation clause

Mr Chairman, allow me to conclude this Nordic statement with a few comments in relation to the ILC's work on the Most-Favoured-Nation clause.

The Nordic countries continue to commend the work of the ILC Study Group on the Most-Favoured Nation clause, which is ably chaired by Mr Donald McRae. We would like to reiterate that we believe that the on-going attempts to methodically promote the identification of the normative content of various MFN clauses may constitute an important contribution to a greater coherence of international law in this field. An important aspect of this is grounding the Study Group's methodic approach in the principles reflected in articles 31-33 of the Vienna Convention on the Law of Treaties. This is in line with the analysis provided by the Commission in the context of its study of fragmentation of international law.

Furthermore, it has been important to draw upon the practice and considerations that have emerged from GATT, the WTO, OECD and UNCTAD, and considering a typology of various sources of case-law, including in particular arbitral awards. This has shown the existence of differences in approaches taken in the interpretation of MFN provisions, particularly by various arbitrators. We also appreciate the work done so far to identify the contemporary challenges posed by the MFN clause, including the various issues arising from and consequences to be drawn from the *Maffezini* award.

Mr Chairman,

We look forward to the Study Group providing its report, as we believe this will be a useful tool towards promoting legal certainty. The Nordic countries therefore support the continuation and completion of this work, in line with the time frame indicated by the Study Group.

I thank you, Mr Chairman.