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Agenda Item 81: Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions

Statement on behalf of the Nordic countries

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Mr Chairman of the 6th Committee,

I have the honour to make this statement on behalf of the Nordic countries, Denmark, Finland, Iceland, Sweden, and my own country Norway.

We thank the chairman of the International law Commission for his introduction to the work of the ILC during its sixty-fifth session. We are, again, impressed with the way in which the Commission handles and develops complex and important legal issues with the highest quality and efficiency.

In accordance with the work program prepared by the Bureau, I will in this statement address two substantive topics at the ILC's agenda. They are 1) Subsequent agreements and subsequent practice in relation to the interpretation of treaties and 2) Immunity of State officials from foreign criminal jurisdiction. I will also take this opportunity to offer some perspectives on Crimes against humanity, which the Commission this year decided to include on its long-term program of work. I will also, very briefly, reiterate the Nordic view on the topic of Expulsion of aliens.

**Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties**

As regards the topic Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, the Nordic Countries welcome the renewed momentum in the work of the Commission and would like to thank the Commission for its report. We welcome the conclusions adopted by the Commission. The Nordic countries have previously expressed our interest in the issue of interpretation of treaties and underlined the importance of uniform and coherent interpretation of various treaties. In this context, the Nordic countries have raised the

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point that a definition of subsequent practice is important and we are very satisfied to see that such a definition is foreseen in conclusion 4. The Nordic Countries are looking forward to following and contributing to the continued work of the Commission on this topic.

**Immunity of State officials from foreign criminal jurisdiction**

Mr Chairman,

The Nordic countries would like to thank the Special Rapporteur, Ms Concepción Escobar Hernández, for her second report on immunity for State officials. The report further develops the analysis on the scope of the topic and of the concepts of immunity and jurisdiction, and provides detailed considerations on immunity *ratione personae*. We welcome the work related to the preparation of six draft articles, and the Commission's provisional adoption of three clear and coherent articles.

We believe that this work will represent a further step towards a common understanding of the relevant international norms. In contrast to the situation for diplomatic agents and for States as such, there is, in this area, no general legal text expressing the immunity regime.

Mr Chairman,

In its work with the topic at hand the Special Rapporteur and the Commission have pursued an eminently analytical approach. Systematic distinctions are drawn between criminal and civil jurisdiction, between immunities *ratione personae* and *ratione materiae* and between different circumstances that may give rise to particular rules of immunity from criminal jurisdiction, such as in the case of special missions. This deconstruction, so to speak, of sometimes complex issues has, on the one hand, strongly contributed to enhancing our understanding of the various aspects of immunity.

The distinctions drawn and the analytical work carried out on this basis have, however, also served to highlight the close interrelation that exists between these various issues and perspectives. They underscore the importance of avoiding fragmentation in the final outcome of the Commission's work.

The Special Rapporteur writes in her report (paragraph 48), that immunity *ratione personae* and *ratione materiae* share significant common elements, including their basis and purpose. We agree with that observation. We would like to add that certain considerations related to one must be observed when considering the other.

The report acknowledges that the rationale for both types of immunity should be sought in the sovereign equality of States and the need to prevent interference in their internal affairs and to facilitate the maintenance of stable international relations. In this context, we incidentally note that a scarcity or lack of decisions in national courts in this particular context may actually denote the very existence of an established State practice accepted as law, rather than a challenge in the identification of customary international law. Moreover, in our opinion, the identification

between the State and certain individuals acting on its behalf or, in the case of immunity *ratione materiae*, between the State and certain acts carried out on its behalf, is a logical consequence of this rationale. This implies that even if immunity *ratione personae* were found to be limited to the so-called troika of the Head of State, the Head of Government and the Foreign Minister, certain arguments for granting *personae* immunity may be particularly relevant when determining the subjective and material scope of immunity *ratione materiae*.

Mr Chairman,

Notwithstanding the point made by the Special Rapporteur and the Commission on the plans to discuss exceptions to immunity at a later stage (paragraph 18 in the Special Rapporteur's report and paragraph 4 of the comments to draft article 4 in the ILC report), we wish to underline some key aspects related to this issue, as we view them as basic elements for the understanding of the starting point for discussions on immunity.

As addressed through previous statements in this forum, 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 shielded by rules of immunity, by turning them into rules of impunity. We look forward to exploring evidence for the identification of prospective customary international law on this account, taking into consideration landmark treaties and international jurisprudence in this field, reaching back at least to the Nuremberg and Tokyo tribunals. In this relation, we appreciate the Special Rapporteur's expressed preparedness to take into account interpretations arising from or related to international criminal jurisdiction (paragraph 29). In our view, it is reasonable to suggest that crimes such as the commission of genocide, crimes against humanity and serious war crimes should not be included in any definition of acts constituting immunity from the start. We are, however, ready to discuss these matters in depth at a later stage under the heading "exceptions to immunity", as outlined in the work plan presented by the Special Rapporteur.

Mr Chairman,

We believe that several of the issues raised in the Special Rapporteur's report deserve to be explored and discussed in further detail. Further guidance on some issues may be sought in the practice of ICJ. I will not go further into detail at this juncture, but some of the Nordic countries will revert individually in written form within the timeframe set out in order to comment more in depth on some of the issues raised.

**Crimes against humanity**

Mr Chairman,

The ILC has decided to add the topic of Crimes against humanity to its long-term work program. The Nordic countries commend this decision, which we foresee as yet another important step towards the elimination of impunity for serious international crimes.

Clearly, the topic of Crimes against humanity, if appropriately construed, meets the standards of the ILC on topic selection. It is concrete and thus feasible for progressive development and codification. It is also sufficiently advanced due to already existing, treaty based norms vis à vis other international crimes, such as the duty to prevent genocide and war crimes. Last, but not least, it addresses a pressing concern of the international community as a whole: preventing and effectively punishing crimes against humanity.

Mr Chairman

There is already a rock-solid basis in international customary law for the individual criminal responsibility for crimes against humanity. General Assembly resolution 95 (I) was adopted on 11 December 1946 following the judgment the same year by the International Military Tribunal at Nürnberg. The agreement for the establishment of the tribunal, with its Charter, had been signed in London on 8 August 1945. In its resolution, the General Assembly affirmed the principles of international law recognized by the Charter and the judgment of the Tribunal, later referred to as 'the Nürnberg principles'. By "affirming" those principles, the General Assembly expressed its approval of the general concepts and legal constructs of criminal law that could be derived from the London Charter and the Nürnberg judgment.

Consequently, at the first session of the International Law Commission in 1949, the question arose as to whether or not the Commission should ascertain to what extent the principles contained in that Charter and judgment constituted principles of international law. The conclusion was that since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission was not to express any appreciation of those principles as principles of international law but merely to formulate them (Yearbook of the International Law Commission, 1950, vol. II, para. 96). We note that Principle II states that criminal liability exists under international law even if domestic law does not punish an act which is an international crime. This idea had already been set out in article 6 (c) of the Nürnberg Charter, concerning crimes against humanity – defined as certain categories of acts "whether or not [such acts were committed] in violation of the domestic law of the country where perpetrated". In its judgment, the tribunal held that "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state" (IMT Judgment, p. 42). It is also on this basis that the Statutes of the international criminal tribunals for the former Yugoslavia and Rwanda, both include definitions of crimes against humanity that reflect this customary international law.

The 1998 Rome statute for the International Criminal Court establishes a universally recognized and comprehensive definition of these crimes – as it was adopted on the basis of consensus and was widely recognized as satisfying all relevant criteria of the principle of *nullum crimen sine lege*. Nevertheless, while the Rome Statute regulates a number of aspects related to the prosecution of such crimes, it does not address the duties of states with relation to prevention of such crimes, and it does not provide a general framework for inter-State cooperation. These distinct, yet connected obligations are crucial to the international effort against crimes against humanity.

Mr Chairman,

While we express our support to ILC's consideration of the topic of crimes against humanity, there are at the same time certain parameters that need to be taken into account in the Commission's future work.

First, it is the firm opinion of the Nordic countries that agreed language within the Rome Statute cannot be opened for reconsideration in this process. Notably, the definition of crimes against humanity in Article 7 of the Rome Statute must be retained as the material basis for any further work of the ILC on this topic.

Second, robust inter-State cooperation for the purposes of investigation, prosecution and punishment of these crimes is crucial, as is the obligation to extradite or prosecute alleged offenders, regardless of their nationality. It is therefore important that the Commission's work on Crimes against humanity include a legal analysis of the obligation to extradite or prosecute. Moreover, it is equally important that clear principles on the latter be identified. Additional clarity on the scope of application of this obligation would help to ensure maximum effect and compliance with existing rules.

Third, it is our assessment that the international efforts to eliminate these crimes can only be successful if sufficient attention is also devoted to prevention of crimes against humanity. We would therefore encourage the Commission to explore and articulate the relevant responsibilities pertaining to prevention of crimes against humanity. In this regard, we encourage the Commission to consider innovative measures and mechanisms to ensure effective prevention.

Finally, while development on this topic towards a further operationalization of the recognition of a duty of prevention and obligations of inter-state cooperation is highly welcome, the Nordic states underline that no such obligations can be construed so as to limit either already existing, similar obligations vis à vis other crimes, or already existing legal obligations in this field.

Mr Chairman,

We commend the important work which has already been conducted by the Commission on related topics, such as the 1996 Draft Code of Crimes against the Peace and Security of Mankind. We trust that the Commission will conduct its discussions on the basis of the wide available array of international case law relating to crimes against humanity, including as regards particular minorities exposed to persecution.

We have studied Prof. Sean D. Murphy's preparatory report with great interest, and would like to commend on the well-structured and concrete approach which has been chosen. The Nordic countries support the continuation of this topic and we look forward to providing our input as the work of the Commission progresses.

**Expulsion of Aliens**

Mr Chairman,

Allow me to conclude with a few remarks on the topic of Expulsion of aliens. The Nordic countries have in recent years commented on this topic and, like a large number of other States, have with some consistency expressed scepticism towards this topic. In this regard, we would like to refer to the points raised in our statement last year. The Nordic countries, as a consequence of the expressed view, do not believe it feasible or indeed desirable at this stage to attempt to develop the draft articles into legally binding norms. We would thus prefer that the end-result of the work of the ILC under this agenda item would be in the form of guidelines or principles.