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Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions

Chapter VI: Protection of persons in the event of disasters
Chapter VII: Formation and evidence of customary international law
Chapter VIII: Provisional application of treaties
Chapter IX: Protection of the environment in relation to armed conflicts

Statement

on behalf of the Nordic countries

by
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(check against delivery)

Mr. Chairman,

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

In accordance with the work programme of the Committee, I will in this statement address the following topics on the ILC agenda: Protection of persons in the event of disasters, Identification of customary international law, Provisional application of treaties and Protection of the environment in relation to armed conflicts.

[Protection of persons in the event of disasters]

Mr. Chairman,

Regarding Chapter VI of the ILC report on the Protection of persons in the event of disasters, we would like to thank the Special Rapporteur, Mr. Eduardo Valencia-Ospina, for his profound and analytical report. We appreciate the progress made by the Commission concerning this important topic. At its last session, the Commission adopted commentaries to draft articles 5, 5bis, 5ter and 12 to 16. We welcome the Special Rapporteur's efforts to strike a balance between three important aspects: state sovereignty, the legal obligation of conduct of assisting States and the relevance and limits of disaster relief assistance. In his sixth report, the Special Rapporteur studied the scope of application *ratione temporis* of the duty to cooperate which also covered the pre-disaster phase. His study resulted in two useful draft articles 5ter and 16.

The Nordic countries attach great importance to risk reduction as a way to prevent, mitigate and prepare for disasters. The draft articles at hand complement duly the Commission's earlier work on disaster and post-disaster phases. We agree with the Commission that it is the basic obligation of each State to reduce the risk of disasters through such measures that are necessary and appropriate for this purpose. This duty is based on principles of international human rights law and environmental law. At this point, it is also necessary to observe the principle of due diligence which is well-established in international law and reflected in the case law of international tribunals. The principle of due diligence is closely linked to preventive measures in the pre-disaster phase.

As far as draft article 16 is concerned, the Nordic countries support the wording "Each State" to underline the obligation for every State to act on an individual basis. The word "shall" is also the right choice to point out the existence of a legal obligation to take measures. It is important to note that the list of three categories of measures in paragraph 2 of draft article 16 is not meant to be exhaustive. This listing only serves as an example of a wide range of practical measures that should be undertaken by the public and private sector actors. It is pertinent to underline the importance of national legislation in draft article 16 but legislation is not enough. There is also a need for effective practical measures to reduce the risk for and consequences of disaster.

In disaster and post-disaster phases, the affected State has the primary duty to ensure the protection of persons and provision of disaster relief. In the pre-disaster phase, the responsibility for disaster risk reduction belongs to each State at domestic level. Having said that, there is also a duty to cooperate in the pre-disaster phase which is reflected in draft article 5ter. This new article is linked to draft articles 5 and 5bis, so it would be logical to place them close to each other. It is our view that disaster risk reduction is such a vital question that the Commission might wish to consider finding a location for current draft article 16 among the initial articles because pre-disaster measures should come first as they deal with the prevention of disasters.

[Identification of customary international law]

Mr. Chairman,

As we address the topic concerning identification of customary international law, we would like to commend the Special Rapporteur, Sir Michael Wood, for his comprehensive and useful first report and the Secretariat for drawing up a memorandum with elements in the previous work of the ILC that could be particularly relevant to the topic.

The process of identifying the existence of a rule of customary international law can be both difficult and challenging. For this reason, it is most welcome that the ILC now engages in analyzing this.

We agree with Special Rapporteur Michael Wood and his ambition to identify certain conclusions with commentaries or guidelines, which could be a valuable tool for practitioners facing questions of customary international law.

In developing such tools it is important not to limit the sources or approaches in an unwarranted way. The whole purpose of the exercise must be to identify as many forms and as much evidence as possible and eventually give guidance on methodology in a practical form. Here, the Nordic countries agree with the Special Rapporteur when he, in the first report, finds that the aim of the topic is to offer some guidance to those called upon to apply rules of customary international law on how to identify such rules in concrete cases.

Also, it is our hope that the conclusions with commentaries or guidelines would have a practical and operational focus rather than seeking to clarify outstanding theoretical discussions or attempting to redefine the notion of customary international law and its constituent elements.

Mr. Chairman,

The Nordic Countries have at an earlier occasion expressed their interest in further studying the interplay between multilateral work and the emergence of new rules of customary international law. We are happy to see that the Special Rapporteur is keen to take a closer look at this.

The interplay between these two "entangled" sources of international law is highly relevant as it is generally recognized that treaties may be reflective of pre-existing rules of customary international law; generate new rules and serve as evidence of their existence; or, through their negotiation processes, have a crystallizing effect for emerging rules of customary international law. Such a relationship is particularly interesting in light of the fact that, as the Special Rapporteur explains with a quotation, "contemporary customary international law, although unwritten, is increasingly characterized by the strict relationship between it and written texts".

When dealing with the interplay between multilateral work and the identification of customary international law, we would caution against only looking at multilateral work in the form of legally binding treaties that have entered into force. State practice and *opinio juris* which could in due course be capable of forming rules of customary international law may also find its expression through other means in the multilateral context.

Finally, the Nordic countries support the proposal of the Special Rapporteur to have his 2014 report discussing the two elements of customary international law and to consider the effects of treaties on customary international law and the role of international organizations.

[Provisional application of treaties]

Mr. Chairman,

As far as provisional application of treaties is concerned, the Nordic countries wish to thank the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his first report which seeks to establish the principal legal issues that arise in the context of provisional application, as well as for the informative memorandum by the Secretariat of the International Law Commission tracing the negotiating history of Article 25 of the Vienna Convention on the Law of Treaties which provides the central norms relating to provisional application of treaties.

On the basis of this material and the deliberations of the Commission, we are of the view that the topic is well suited to be considered by the ILC. While many of us struggle with the challenges provisional application poses to our national procedures, this topic provides amplitude of questions of international law character which merit consideration by the Commission. These include legal effect of provisional application, customary international law character of provisional application and relationship of Article 25 with the other provisions of the Vienna Convention.

The Nordic countries have previously expressed their agreement with 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.

While we acknowledge that there is many times a need for provisional application in order to enable speedy implementation of newly established treaties, we agree with the approach of the Commission neither to encourage nor discourage the resort to this possibility as it is for States to decide whether and when it is an appropriate avenue. Such a decision is essentially a constitutional and a policy matter for States. However, since the Commission's analysis is likely to identify strengths and weaknesses of different models of provisional application, it may be considered whether the Commission's work would benefit from including further analysis of the different models of provisional application, including partial provisional application. For instance, one may find that provisional application from the date of signature raises questions different from and additional to provisional application from the date of ratification. Therefore it may be feasible to distinguish between the two. The latter seems for example not to raise questions with regard to circumvention of domestic procedures, including constitutional requirements.

As far as the treaties among the Nordic countries are concerned, provisional application has not been resorted to very frequently but I wish to mention one example. In 2010 the Nordic countries concluded a General Security Agreement on the Mutual Protection and Exchange of Classified Information which provides that "[u]ntil the entry into force of this Agreement, each Party may notify at the time of the deposit of the instrument of ratification, acceptance or approval, or any other subsequent time, that it shall consider itself bound by the Agreement in its relations with any other Party having made the same notification. These notifications shall take effect thirty days after the date of receipt of the notification." That example illustrates that provisional application may also be based on a provision avoiding such terminology. The terminology used in this particular example relates to the discussion in the Commission during which it was suggested that concerns about the circumvention of domestic rules could be met by clarifying that the "provisional application" of a treaty carried with it the consequence that the obligations under the treaty would become binding on the State.

Another situation which could deserve further study is when certain treaty obligations are applied provisionally based on a unilateral declaration. An example of this is to be found in the 2013 Arms Trade Treaty, which states in article 23 that "Any State may at the time of signature or the deposit of instrument of its of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.

We wish to comment on the form of the final outcome of this topic once the work has progressed further.

[Protection of the environment in relation to armed conflicts]

Mr. Chairman,

Finally, we welcome the Commission's decision to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work and the

appointment of Dr. Marie Jacobsson as Special Rapporteur for the topic. This topic is a logical continuation of the Commission's recent work on the closely related topics "Effects of armed conflicts on treaties" and "Fragmentation of international law". A natural starting point for the work is therefore that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties. We have noted the Special Rapporteur's request that States provide examples of when international environmental law had continued to apply in times of armed conflict, to which we hope to be able to respond.

Mr Chairman,

The effects of warfare on the natural environment may be severe and have a long-lasting impact on several levels. Not only may the actual force applied in a combat situation lead to the physical destruction of vulnerable natural environment, and the killing of wildlife in these areas; related military activities, including large scale transportation and operations, may also cause pollution of the ground, the destruction of plant life and disrupted water flows, leaving ecosystems out of balance.

The use of certain types of weapons by the parties to armed conflict may also lead to large areas being contaminated by unexploded ordnance, burned down, or poisoned – either as the result of a deliberate act, or as an indirect result of the fighting. Furthermore, large numbers of refugees or internally displaced people gathering in an area may also lead to deforestation and soil erosion, adding to the excessive pressure being put on the resources of a local environment.

In turn, harmful effects on the environment may have a severe impact on the civilian population living in the affected areas, during the armed conflict itself, but also beyond, and in some cases for years and decades after the conflict has ended. The destruction of the natural resources necessary for the survival of the civilian population may in the short term lead to famine and the displacement of whole populations. Moreover, the long-term effects of armed conflict on the environment may seriously hamper post-conflict reconstruction of the area and development efforts, which may in turn undermine peace and reconciliation processes. As the inhabitants of the areas concerned will have to grow or harvest food in areas that are heavily polluted or contaminated by unexploded ordnance, they will also suffer injuries and a variety of other health problems. There is a need to put more emphasis on environmental questions in post-conflict situations. For reaching a sustainable peace in the long run, diverse measures of crisis management, peace building and post-conflict are needed.

It is, however, important to be aware that there are already applicable rules for the protection of the natural environment in relation to armed conflict. The existing international legal framework, including in the areas of international humanitarian law, international environmental law, and international human rights law, provides for significant legal obligations that either directly or indirectly have a bearing on the protection of the environment during armed conflict.

Nevertheless, the severe damage that is inflicted on the natural environment during hostilities makes it necessary for us to ask whether the existing obligations are in fact fully adequate, or whether they may need to be further developed. When making this assessment, there are several issues that need to be further clarified.

First of all, the exact scope of the legal obligations that already apply, and how these obligations should be interpreted, has by many been considered to be unclear. The same can be said for the relationship between the various legal frameworks that may be applicable. This includes the question of whether legal instruments within the field of international environmental law continue to apply in situations of armed conflict.

We believe the work now undertaken by the International Law Commission and its Special Rapporteur Dr. Marie Jacobsson will provide us with important clarifications on a number of pertinent questions with regard to the protection of the natural environment in armed conflicts. In this context, we also welcome the Special Rapporteur's approach of addressing the topic in temporal phases. Dealing with the protection of the environment before, during, and after conflict will add clarity and make the topic easier to delineate.

Mr. Chairman,

When considering whether or not the existing legal obligations are adequate, there are also other factors that need to be examined further. A broad assessment should be made of the harmful effects of military operations on the natural environment as such, as well as the subsequent harm inflicted on the civilian population that is dependent on certain natural resources for its survival. Several important studies have already been conducted, focusing on the environmental consequences of military operations. We would like to take this opportunity to commend UNEP for its contributions in this regard. In order to gain a clearer picture of the humanitarian harm caused by warfare and the resulting destruction of the natural environment, there is, however, also a need to focus on the knock-on effects on the civilian populations as such.

An important question is whether the extensive damage caused to the natural environment by armed conflicts is primarily a result of a lack of clear legal obligations to protect the natural environment, or if it may be due to a lack of effective implementation of the already existing obligations, or a combination of the two.

An assessment of this question would in our view be of paramount importance when discussing how to improve the protection of the natural environment in relation to armed conflicts. We take, in this connection, this opportunity to thank the ICRC for its work in this field. This includes the elaboration in 1996 of its "Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict".

A natural question to ask next is: If we find that the existing legal obligations are not being properly implemented by parties to conflicts, would it be possible to identify measures that could contribute to the strengthened implementation of these rules?

During the 31st International Conference of the Red Cross and Red Crescent in 2011, the Governments of Denmark, Finland, Norway and Sweden, and the National Red Cross Societies of the same States, made a joint pledge to conduct an empirical study of these two issues, drawing on experience gained from a select number of recent armed conflicts. The report from the study will form the basis for an international expert meeting that will aim to discuss possible further steps to be taken to improve the protection of the natural environment during armed conflicts.

I thank you.