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Agenda item 78:
Report of the International Law Commission on the work of its sixty-sixth session

Statement by Denmark, Finland, Iceland, Norway and Sweden
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Chair,

I have the honour to make this statement on behalf of the five Nordic countries: Denmark, Finland, Iceland, Sweden and Norway. In this Part 3 of the Committee's consideration of the ILC report, I will address these three topics:

- Identification of customary international law (Chapter X)
- Protection of the environment in relation to armed conflicts (Chapter XI)
- Provisional application of treaties (Chapter XII)

(Check against delivery)

Identification of customary international law

I would like to commend the Special Rapporteur for the excellent second report on the topic of identification of international customary law. It is a topic, which, although of a quite theoretical nature, is also of great practical importance. We support an outcome in the form of conclusions as the most appropriate tool to assist practitioners, and we value the substantial contribution, which the Commission's work has already yielded.

We agree with the approach of the Special Rapporteur and the Commission to focus initially on the two constitutive elements of rules of customary international law. We also agree with the limitations suggested both with regard to the scope of the topic as expressed in the title of the subject as well as the exclusion of the issue of jus cogens from the conclusions.

With regard to draft conclusion 6 we agree that the general standard for the determination of state practice should be whether or not an act is attributable to the state in question. And further, that the standard for attribution should be the same as under the rules of state responsibility. There is, however, a need to exclude for example ultra vires acts which may under the state responsibility rules be attributable to the state in question, but should not serve as evidence towards custom.

We welcome the wording of draft conclusion 7 that practice may take a wide range of forms. As to the question of whether general practice can also be expressed through inaction, as suggested in draft conclusion 7, we would tend to agree that this is the case. We are, however, also of the view that the precise conditions for when this is the case should be further examined, particularly what type of circumstances should exist, and interests be at stake, for inaction to become relevant. Just as action by specially affected states is given particular weight, inaction by specially affected states is correctly given more importance in the draft conclusions.

With regard to inaction as evidence of acceptance as law as suggested in draft conclusion 11, 3 we again believe that this may be accepted as a general rule, but that the circumstances of when this rule comes into play should be further explored.

Finally on this topic, a note on the role of international organisations in the creation of custom. We are aware that the issue of whether or not international organisations can contribute to the creation of custom will only be addressed in the Special Rapporteur's third report. We would, however, already at this point like to express the view that we do believe international organisations can play such a role. That is particularly the case in instances where such organisations have been granted powers by member states to exercise competence on their behalf in for example international negotiations. Thus, at least where international organisations can be said to act on the international scene on behalf of states it would seem correct to allow for such practice to contribute to the creation of custom.

Taking into account that some international organisations may act only upon unanimous decisions or have members or bodies with veto powers, it should be explored by the Special Rapporteur whether inaction by an international organisation would be of a different nature than inaction by a State with regard to identifying forms of practice in draft conclusion 7 no. 4. We look forward to the Special Rapporteur's further consideration of this issue in the third report.

Protection of the environment in relation to armed conflicts

I will now turn to Chapter XI of the ILC report, which focuses on the environmental rules and principles applicable to the protection of the environment in peacetime.

We would like to start by thanking Special Rapporteur Dr Marie Jacobsson for her preliminary report to the ILC on the protection of the environment in relation to armed conflicts. This is a comprehensive and useful report on Phase I of the topic.

It is well known that modern warfare causes serious damage to the natural environment, and that armed conflict has severe and long-lasting consequences both for nature itself and for civilian populations who depend on natural resources for their survival. Open warfare may result in physical destruction of the natural environment; in addition, related military activities, including large-scale transport and other operations, may pollute soils, destroy plant life and disrupt water flow, disturbing the balance of ecosystems.

The Nordic countries consider it vital to enhance protection of the environment before, during and after armed conflict. Clarification of existing international law may help us to achieve this aim. The Nordic countries therefore welcomed the decision by the Commission to include this topic in its programme of work, and we have been encouraged by the leadership and dedication demonstrated by Dr Jacobsson.

In her report, the Special Rapporteur notes that the protection of the environment in armed conflicts has to this point been viewed primarily through the lens of the law of armed conflict. We agree with the Special Rapporteur that this perspective is clearly too narrow, as modern international law recognises that the international law applicable during an armed conflict may be wider than the law of armed conflict. The International Law Commission states clearly in a recent work on the effects of armed conflicts on treaties that that the existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties. Indeed, in its draft articles, the Commission includes an indicative list of treaties whose subject matter implies that they continue in operation during armed conflict.

Against this background, we also agree with the three-phased approach adopted by the Special Rapporteur. We believe the present report on the environmental rules and principles applicable to the protection of the environment in peacetime will provide the necessary basis for continued work and discussions on phases II and III, which will deal with measures to be taken during an armed conflict and in the post-conflict phase respectively.

We also agree with the Special Rapporteur that one should not attempt to draw a strict line between the three phases. In this context we would like to stress that identifying and clarifying the obligations that apply during armed conflict would be an important step towards reducing the environmental damage in such situations.

Furthermore, we agree that the scope of this topic must be restricted in some way, for practical, procedural and substantive reasons, and that it is necessary to exclude certain issues. We generally agree with the limitations proposed in the report. All in all, we consider that this first report on the protection of the environment in relation to armed conflicts provides a very good basis for continued work on the topic.

Let me take this opportunity to briefly mention that the Governments of Denmark, Finland, Sweden and Norway, together with our National Red Cross Societies, are continuing our own work on this issue. This is a follow-up of our joint pledge during the 31st International Conference of the Red Cross and Red Crescent in 2011.

Our work plan falls in two parts. The first part involves an empirical study of the effects of armed conflicts on the environment, based on reviewing a cluster of representative contemporary armed conflicts. This study is well under way. Secondly, we will organise an international expert meeting to discuss the existing legal framework for the protection of the environment in relation to armed conflict, and to identify any gaps in this framework, based

on the empirical data collected in the report. The conclusions of the expert meeting will be reported to the 32nd International Conference of the Red Cross and Red Crescent, which will take place in 2015.

Provisional application of treaties

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 second report which seeks to provide a substantive analysis of the legal effects of the provisional application of treaties. The Nordic countries welcome the efforts of the Commission on this topic providing an amplitude of questions of an international law character which merit consideration. These include the legal effects of provisional application, its customary international law character and the relationship of Article 25 with the other provisions of the Vienna Convention.

We express our support for the decision of the Special Rapporteur and the Commission not to embark on a comparative study of domestic provisions relating to the provisional application of treaties. Whether or not a State resorts to provisional application is essentially a constitutional and policy matter.

The Commission has expressed its agreement with the view that the provisional application of a treaty produces legal effects and is capable of giving rise to legal obligations, and that those are the same as if the treaty were itself in force for that State. The Nordic countries are of the view 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. The question of legal consequences arising from a breach of a treaty being provisionally applied requires some further study.

The analysis of this topic is likely to identify strengths and weaknesses of different models of provisional application and, therefore, it may be considered whether the Commission´s work would benefit from further analysis of the different models of provisional application. This includes the possibility for a State to unilaterally declare its intention to provisionally apply a treaty when the source for provisional application does not arise from a provision of the treaty itself, a question which was debated by the Commission.

The rapporteur calls for more information on State practice, which will provide him with a representative sample of such practice for drawing conclusions. The Nordic countries have previously mentioned examples of Agreements where provisional application has been resorted to, such as the 2010 General Security Agreement on the Mutual Protection and exchange of Classified Information between the Nordic countries and the 2013 Arms Trade Treaty.

One model of provisional application is the adoption of the decision 1/CMP.8, where the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol recognized that Parties may provisionally apply the Doha Amendment pending its entry into force in accordance with Articles 20 and 21 of the Kyoto Protocol. The Parties intending to provisionally apply the Doha Amendment pending its entry into force in accordance with Articles 20 and 21 of the Protocol may provide notification to the Depositary of their intention to provisionally apply the Amendment. The Nordic countries implement the above mentioned treaties provisionally with the same legal effects as if they had formally been in force.

It may often take a certain amount of time to complete the constitutional requirements for ratification in the required number of States Parties. Provisional application may in such

cases provide a suitable instrument to bring the treaty into early effect. Therefore, it might be useful if the Commission could develop model clauses on provisional application.

The Nordic countries find it important that the question of the provisional application of treaties by international organizations will be addressed as part of the further work on the topic, as it is stated in the second report in accordance with the mandate. For example, it is common that provisional application is resorted to in the cooperation agreements entered into by the EU and its Member States with a third State.

In concluding, we renew our wish to comment on the form of the final outcome of this topic once the work has progressed further.

Thank you, Chair.