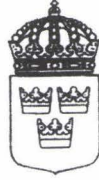




# SWEDEN



## STATEMENT

**On behalf of the Nordic Countries  
Denmark, Finland, Iceland, Norway and Sweden**

**by**

**H.E. Ambassador Anders Rönquist,  
Director General for Legal Affairs, Ministry for Foreign Affairs of Sweden**

**on the topics of Crimes against humanity, Subsequent Agreements and  
Subsequent Practice in Relation to Treaty Interpretation and  
identification of international customary law, Agenda item 83,**

**in the**

**Sixth Committee of the General Assembly**

**United Nations  
New York**

**4 November 2015**

**Check against delivery**

Mr Chairman,

I have the honour to speak on behalf of the five Nordic countries, Denmark, Finland, Iceland, Norway and my own country Sweden. on the three items under cluster 2 of the ILC report.

On the topic of **Crimes against humanity** we thank the Special Rapporteur Mr Sean D. Murphy for his first excellent report and the ILC for the first draft articles, which provide an encouraging basis for further work in the Commission on this important topic.

First, we welcome the general approach of the Special Rapporteur to keep the definition of the crime in Article 7 of the Rome Statute as the material basis for any further work of the ILC on this topic.

Second, we endorse the character of the topic as complementary to the Rome Statute system, as explained by the Special Rapporteur in his report. A possible treaty could reinforce the ICC and the Rome Statute system as a whole through its focus on the obligation of states to prevent and punish crimes against humanity. The focus on robust interstate cooperation is therefore to be welcomed. As we pointed out last year, this work could benefit from a legal analysis of the obligation to extradite or prosecute with a view to identifying the scope of application of that obligation with regard to crimes against humanity. In this respect, last year's ILC-report on the topic *aut dedere aut judicare* provides an excellent starting point.

Third, the Nordic countries strongly endorse the focus on the obligation of prevention. In order that this obligation would become more precise and effective we would suggest that additional wording be included as to the concrete nature and methods of prevention. Thus, we would suggest, in line with paragraph (17) of the commentary to draft article 4 that an additional article would lay down the obligation to adopt national laws and policies to establish awareness of the crime against humanity and to promote early detection of any risk of its commission, as well as an obligation to pursue initiatives that educate and inform governmental officials in order specifically to prevent crimes against humanity. We also believe that inspiration may also be drawn from the UN Convention on Enforced Disappearances so that states parties would ensure that orders or instructions prescribing, authorizing or encouraging crimes against humanity are prohibited and that persons who refuse to obey such orders will not be punished.

Finally, while welcoming development towards further recognition of a duty of prevention and obligations of interstate cooperation, the Nordic countries underline that no such obligations can be construed so as to limit either already existing, similar obligations vis-à-vis other crimes, or other already existing legal obligations in this field. We would furthermore like to draw attention to our comments last year after the Commission decided to add the topic to its programme of work.

Mr Chairman,

The Nordic countries thank the Special Rapporteur Mr George Nolte and the Commission for further development on the topic **Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation** and for provisionally adopting draft conclusion 11 on constituent instruments of international organizations.

With regard to the specific issue in para 26 (b) of Chapter III of the Report on which the Commission has asked for comments by Member States the Nordic countries recall what we said at last year's meeting: General Comments and views expressed in individual cases by treaty bodies consisting of independent experts should be of great importance for States' implementation and interpretation of international conventions at national level and be used actively in the work to follow up conventions at national level. However, such comments and views should be regarded as means of interpretation. They should not be regarded as legally binding or as having the purpose of amending a treaty.

Let us this year expand a bit on this.

The Nordic Countries fully endorse the views expressed by the High Commissioner for Human Rights, Mr. Zeid Ra'ad Al Hussein, in addressing the ILC this year, that the work of the UN human rights treaty bodies greatly contributes to the development of international human rights law – not only through their jurisprudence, following consideration of many individual cases, but also through important general comments.

General Comments can be viewed as interpretative statements, which can contribute to a normative consensus. They can serve as means to ensure a dynamic nature of international human rights law. All human rights treaties must be regarded as living instruments whose interpretation develops over time. Let me take as an example General Comment No 34 to the International Covenant on Civil and Political Rights which interprets the right to freedom of expression as including electronic and internet-based modes of expression. In particular the Human Rights Committee has over the years brought about general acceptance of their pronouncements.

The European Court on Human Rights has also on several occasions referred to general comments by UN treaty bodies in interpreting human rights norms.

Individual communications procedures have the potential to play a constructive role in assisting States parties to discharge their human rights obligations.

When it comes to views in individual cases it is important that treaty bodies take special care when drafting their opinions. The legal basis for the views should be grounded in the treaty text. More detailed legal reasoning would facilitate the State party's consideration of implementation measures required by the decision, and also thereby promote consistent interpretation. The legal significance of the views is to a large extent dependent on their content and quality and their legally persuasive character.

Finally, on a general note, the Nordic countries would like to point to the need for an interpretation of the individual treaty establishing an international organisation, and assessment of the conduct of that particular organisation, in order to establish the legal effects of such subsequent agreement or practice. Jurisprudence from the International Court of Justice has confirmed this.

Mr Chairman,

The Nordic countries would like to commend the Special Rapporteur Sir Michael Wood for the excellent third report on the topic of **identification of international customary law**.

We continue to believe that this topic, although somewhat theoretical in nature, is of great practical importance and that an outcome in the form of conclusions is the most appropriate tool to assist practitioners.

I will touch on a few issues on this topic.

Firstly, regarding the question of particular custom: We agree that a customary rule may under certain circumstances develop among a limited number of states. The narrow geographic or thematic scope of such a particular custom requires very clear identification of which states have participated in the practice and accepted it as law. In this context we would have sympathy for the view expressed by the commission that special attention should be paid to the importance of acquiescence for the identification of a particular custom. This, in our view, is not in order to establish different criteria for the creation of general custom and particular custom, but rather to underline the importance of this element when establishing the scope of application of a particular custom.

Secondly, we welcome the efforts to include in the conclusions the persistent objector rule. The Nordic states share the view that a state which has persistently objected to an emerging rule of customary international law and maintained its objection after the rule has crystallised is not bound by that rule, while taking into account the category of rule to which the state objects. Particular consideration must be given in this work to universal respect for fundamental rules, particularly those for the protection of individuals.

Thirdly, we notice the debate on the question relating to the interrelationship between the two constituent elements, and if the same evidence could be used in order to ascertain the two elements, sometimes referred to as “double-counting”. The Special Rapporteur clarified in his report that there could be occasions where the same evidence might be used in order to ascertain the two elements, and in the Commission’s discussion, some members of the Commission expressed that the separate assessment of the two requirements does not mean that the same material could not be evidence of both elements. The Nordic states concur with these views.

Finally, we share the view that in certain instances the practice of international organisations can in itself contribute to the creation, or be the expression, of rules of customary international law. 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. It is also the case that the practice of states themselves acting within international organisations can serve as evidence or expression of custom.

In this context, we note the debate in the Commission, referred to in this year’s ILC report, regarding the evidentiary value of resolutions of international organisations. Particularly regarding resolutions of the United Nations General Assembly we share the view of those members who urged caution when assessing the evidentiary value of such resolutions. A number of factors should be taken into consideration in this context, such as the voting and the procedure in adopting the resolution as well as the particular wording of the resolution.

The Nordic states would furthermore like to express their support for the view expressed in the report of the Commission that decisions of national courts have to be viewed with some caution in the context of customary international law.

Mr Chairman,

We look forward to the Commission’s consideration at its next session of the provisional adoption of the entire set of draft conclusions as well as the commentaries thereto. This will provide a comprehensive overview of the important work. Together with the Secretariat’s forthcoming memorandum concerning the role of decisions of national courts in the case-law of international courts and tribunals for the purpose of determination of customary international law, this will provide a good basis for the conclusion of the consideration of this topic.

Thank you, Mr Chairman.