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Report of the International Law Commission - Cluster 3

Statement on behalf of the Nordic countries

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Mr. Chairman,

I have the honour of speaking on behalf of the five Nordic countries, Finland, Iceland, Denmark, Sweden and my own country Norway. I will address the three topics contained in Cluster 3 of the Report of the International Law Commission.

As we all know, modern warfare causes serious damage to the natural environment, and armed conflict has severe, wide-reaching and long-lasting consequences, both for nature itself and for civilian populations who depend on natural resources for their survival.

The Nordic countries consider it vital to enhance protection of the environment before, during and after armed conflict, and we believe that clarifying relevant existing rules and principles within international law may help us to achieve this aim.

(Check against delivery)

Mr. Chairman,

We would like to start by expressing our gratitude to Special Rapporteur Dr. Marie Jacobsson for providing us with a very well-prepared and thorough second report, focusing on rules and principles within international humanitarian law that are relevant for the protection of the environment and applicable in situations of armed conflict.

We would also like to commend the Drafting Committee, chaired by Mr. Mathias Forteau, for its further work on the proposed first set of draft principles elaborated by the Special Rapporteur.

Mr. Chairman,

The Nordic countries would like to express their support for the draft principles as presented, including the proposed scope of the principles, the purpose and the use of terms.

We emphasize that there is an obligation under existing international law to respect and protect the environment in situations of armed conflict. This applies in particular to the general principles and rules on distinction, proportionality, military necessity and precautions in attack.

We support the draft principles II-1, II-2 and II-3, which we believe reflect some of the obligations under international humanitarian law that are most pertinent for the protection of the environment in armed conflicts.

In addition, we would like to express our support for inclusion of the proposed principle II-4, which establishes that attacks against the environment by way of reprisals are prohibited.

In this context, we note that the commentary will reflect the extent of the divisions on this issue, based, inter alia, on different views as to whether this principle reflects customary international law. It will also reflect the fact that some States are not Party to Additional Protocol I to the Geneva Conventions, in which this principle is clearly stated.

We also find the proposed draft principle II-5 interesting. This principle states that areas of major environmental and cultural importance designated by agreement as protected zones shall be protected against attack, as long as they do not contain a military objective.

In certain situations it may prove challenging to establish such of agreements between the different parties to an armed conflict. This being said, provided such agreements are established and respected by the parties, we believe such an approach might contribute significantly to the increased protection of the environment in armed conflicts. We therefore believe this proposal merits further discussion.

Mr. Chairman,

Let me conclude my comments on this topic by wishing the Committee, and its Special Rapporteur, every success in their continued work on this issue. We look forward to receiving the third report, as well as a further elaborated set of draft principles.

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Mr. Chairman,

I will now turn to Chapter X of the report, which focuses on Immunity of State Officials from foreign criminal jurisdiction.

The Nordic countries would like to thank the Special Rapporteur, Ms. Concepción Escobar Hernández, for her fourth report on immunity of State officials from foreign criminal jurisdiction.

The report continues the analysis, commenced in last year's report, of the normative elements of immunity *ratione materiae*, focusing on the material and temporal scope of such immunity. It highlights the basic characteristics of this type of immunity, namely, that it is granted only in respect of "acts performed in an official capacity" and that it is not time-limited. The report also contains proposals for two more draft articles.

We fully agree with the methodological approach taken by the Special Rapporteur in the present and previous reports, basing her analysis of the issues on treaty practice, international and national case law, as well as previous work of the Commission, and taking account of written comments and statements by Governments.

The fourth report and the Commission's consideration of it clearly demonstrates that several elements of the subject matter are legally complex and raise important issues of inter-State relations.

First, we need to seek legal clarity in questions relating to the fight against impunity for serious crimes of international concern such as war crimes, crimes against humanity and genocide within the sphere of national jurisdictions, while at the same time seeking to preserve a legal framework for stability in inter-State relations.

In our opinion, this exercise should strive for legal consistency with the rules pertaining to immunity for State officials for the same categories of crimes before international courts, in particular the regime under the Rome Statute of the International Criminal Court.

The gravity involved in serious crimes of international concern speaks against any form of immunity for such crimes also within national jurisdictions. Furthermore, it is generally difficult to identify any real functional need to uphold immunity of State officials if they commit such crimes.

Secondly, we must deal with an important methodological question. Should we address acts that could be beyond the benefit of immunity *ratione materiae* as limitations or exceptions to immunity, or should we instead deal with the issue when defining 'acts performed in an official capacity'?

This is a question that needs further consideration, as stated in this year's report of the International Law Commission on the topic. Being able to categorize particular acts as being private acts, and therefore falling outside the scope of immunity *ratione materiae*, might be a valuable 'safety valve' to ensure that no one can shield behind rules of immunity to gain impunity for the gravest international criminal acts.

In any circumstance, the functional needs of State officials should, in the view of the Nordic States, give guidance when determining the extent of immunity *ratione materiae*. Without taking a final stand on this methodological issue at the present stage, the Nordic States would like to reiterate that crimes such as the commission of genocide cannot be considered 'an official act'.

We would also reiterate the need to consider solutions, which combine such limitation of immunity with appropriate procedural safeguards and due process guarantees against any misuse of power or political interference in the sphere of independent prosecutors.

We also agree that the definition of an 'act performed in an official capacity' in the draft articles should be recast in such a way as to remove the requirements of criminality, as proposed in the draft articles provisionally adopted by the Drafting Committee.

Mr. Chairman,

The Special Rapporteur has noted that the question of limitations and exceptions to immunity will be analyzed in greater detail in her fifth report, due in 2016. As underlined on previous occasions, the Nordic countries are of the view that for the most serious crimes that concern the international community as a whole, no State officials should be shielded by rules of immunity.

We look forward to receiving the next report of the Special Rapporteur.

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On the topic of provisional application of treaties, the Nordic countries wish to thank the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his third report.

The Nordic countries continue to support the efforts of the Commission on this topic, which provides a number of questions of an international law character worthy of consideration. These include the relationship of Article 25 with the other provisions of the Vienna Convention on the Law of Treaties and the provisional application of treaties by international organizations, both of which are central themes in the third report.

The report offers an analysis of the comments on State practice that were provided after the second report was submitted. The Nordic countries have previously mentioned examples of

agreements where provisional application has been resorted to. The Rapporteur recognizes that the number of comments on State practice remains insufficient.

We express our continued support for the view of the Rapporteur not to embark on a comparative study of domestic provisions relating to the provisional application of treaties. A significant number of clauses on provisional application provide for provisional application to the extent that it is permitted by the provisions of the domestic legislation of each State.

Whether or not a State resorts to provisional application is essentially a constitutional and policy matter. The report quotes attempts to categorize State practice and to classify States on the basis of whether their internal law allowed for provisional application or not. These quotes illustrate the challenges and underline the need for caution in this respect.

The Nordic countries find it important that the question of provisional application of treaties by international organizations has been addressed in the third 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.

The practice collected by the Rapporteur shows that both States and international organizations frequently resort to provisional application and that both recognize the legal effects of treaties applied provisionally. The Nordic countries emphasize, however, that the topic should not be considered concluded in relation to international organizations, as there are still questions to be reflected upon.

The third report also presents an initial study of the relationship of article 25 with other provisions of the Convention on the Law of Treaties. The Nordic countries note with satisfaction the conclusion of the Commission that legal effects of a provisionally applied

treaty are the same as those stemming from a treaty in force and that provisional application is subject to the *pacta sunt servanda* rule.

As has been stated before, when the Nordic countries agree to apply treaties provisionally, we are of the view that they produce the same legal effects as if they were formally in force. The issue of international responsibility of a breach of a treaty which is applied provisionally may require some further study.

The Nordic countries welcome the six preliminary proposals for guidelines on provisional application of treaties presented by the Rapporteur and the interim report of the drafting Committee to the Commission on the progress made with this respect. Keeping in mind Article 27 of the Vienna Convention on the Law of Treaties, we support the suppression of the reference to internal law in the draft general rule (Draft guideline 3).

The Rapporteur has also called for comments in order to identify the way forward. Some further study on the relationship with other provisions of the Vienna Convention, for instance articles 19, 46 and 60, seems justified.

The Nordic countries support the intention of the Rapporteur and the Commission to continue to formulate draft guidelines. We note that the Commission has discussed the option to adopt draft conclusions as opposed to draft guidelines on this topic. We tend to think that draft guidelines have potential to serve as a practical tool for States and international organizations.

We have earlier suggested that it might be useful if the Commission could develop model clauses on provisional application in its future work. 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.

Model clauses may make it easier to resort to provisional application in such cases. We recognize however that this could be challenging due to the differences between national legal systems, as the Rapporteur has pointed out.

We support the efforts of the Rapporteur and the Commission to gather and analyze State practice. As a part of this work, it would be important to examine the practice of multilateral treaty depositaries, as it seems that there are variations.

In concluding, we look forward to the further work by the Commission on this topic.

I thank you, Mr. Chairman.