



**The Permanent Mission of Iceland
to the United Nations**

**Statement by Iceland on behalf of the Nordic Countries
(Denmark, Finland, Iceland, Norway and Sweden)**

International Law Commission, cluster 2

**Ambassador Helga Hauksdóttir
Director General for Legal and Executive Affairs,
Ministry for Foreign Affairs**

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Mr. Chairman,

I have the honour of speaking on behalf of the five Nordic countries, Finland, Norway, Denmark, Sweden and my own country Iceland. I will address the three topics contained in Cluster 2 of the Report of the International Law Commission.

As far as the topic "Crimes against humanity" is concerned, we would like to thank the Special Rapporteur, Mr Sean D. Murphy, for the thorough work in his second report, and the ILC for the provisional adoption of six further articles. The Nordic countries attach great importance to the prevention and punishment of crimes against humanity and follow the ILC's work with keen interest. We endorse the consideration of this topic as complementary to the Rome Statute and the focus on action to be taken at the national level as well as on cooperation between States. While drawing attention to our earlier comments on the topic, this time we would like to comment a few specific issues related to the second report.

Firstly, we note that the list of "accessorial" modes of responsibility contained in draft article 5, paragraph 2 (c), does not explicitly mention conspiracy or incitement. As explained in the commentary, the ILC has decided to use the various terms set forth in the Rome Statute as the basis for the terms used in draft article 5, paragraph 2. It is further noted in the commentary that in various international instruments the concepts of "soliciting", "inducing" and "aiding and abetting" the crime are generally regarded as including planning, instigating, conspiring and, importantly, directly inciting another person to engage in the action that constitutes the offence. Accordingly, the formulation should not be interpreted as being narrower than the modes of responsibility as contained in the Rome Statute or in many national criminal codes. The criminal codes of the Nordic countries include a criminalization of conspiracy to commit and/or incitement or instigation to a crime against humanity.

Secondly, we would like to discuss the establishment of national jurisdiction in draft article 6. The commentary notes that in general, international instruments have sought to encourage States to establish a relatively wide range of jurisdictional bases under national law to address the most serious crimes of international concern. This is instrumental for eliminating the risk of impunity. In addition to "territorial jurisdiction" the draft article obliges states to establish "active personality jurisdiction". In addition, if the State considers it appropriate it may also establish jurisdiction over stateless persons habitually resident in that State's territory or in cases where the victim is a national of that State. We would like to note that the Nordic countries under their criminal codes generally have "active personality jurisdiction" over not only stateless persons resident in our countries but also over resident foreign nationals. We may also under certain circumstances exercise criminal jurisdiction over crimes committed abroad, directed at our nationals or permanent residents.

Mr. Chairman,

Importantly, draft article 6 together with draft article 9, paragraph 1, set out the obligation to extradite or prosecute (*aut dedere aut judicare*) and do so in its 'triple alternative formula'. In other words, "each State shall also take the necessary measures to establish its jurisdiction ... in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person" to another State or competent international criminal tribunal. We wish to note that in order to effectively support the *aut dedere aut judicare* obligation national courts need to be provided jurisdiction to try the alleged offender if he or

she is not extradited or surrendered. Depending on the circumstances this may require resorting to a jurisdictional base other than just "territorial" or "active personality jurisdiction".

In addition, we note that draft article 6 does not exclude the exercise of even wider jurisdictional base if that is provided for in the national law. Indeed, under international law crimes against humanity are widely seen as crimes subject to universal jurisdiction. Therefore, the Nordic countries would encourage adding a specific reference to universal jurisdiction at the end of draft article 6, paragraph 3.

As far as draft article 7 concerning the obligation of States to investigate acts constituting crimes against humanity in any territory under its jurisdiction, the Nordic countries understand that the formulation "in any territory under its jurisdiction" covers both de jure and de facto jurisdiction and includes places and facilities under the State's control. We would also like to note that there may be merit in making it clear that the obligation of a State to investigate covers acts constituting crimes against humanity when committed by a member of its armed forces abroad.

Finally, we would also like to touch the issue of fair treatment of the alleged offender as well as penalties. The Nordic countries attach great importance to due process considerations, which are particularly pertinent in the context of criminal law. We agree with the ILC that the alleged offender shall at all stages of the proceedings be guaranteed fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law, as reflected in draft article 10. In relation to the obligation in draft article 5, paragraph 6, to ensure that crimes against humanity shall be punishable by appropriate penalties that take into account their grave nature, the Nordic countries would like the draft article to draw inspiration from Article 77 of the Rome Statute of the International Criminal Court which does not include the death penalty as an applicable penalty for genocide, crimes against humanity and war crimes.

Mr. Chairman,

I will now turn to Chapter VIII of the report, which focuses on the Protection of the atmosphere.

The Nordic countries would like to start by thanking the Special Rapporteur, Mr Shinya Murase, for his third report on the Protection of the Atmosphere.

This third report, building on the two previous reports, highlights the key obligations of States, which are to prevent atmospheric pollution, mitigate the risk of atmospheric degradation, take appropriate measures of due diligence, and – not least – undertake an environmental impact assessment for proposed activities that could have a significant adverse impact on the environment.

The fifth guideline, which sets forth the overarching principle of sustainable utilization of the atmosphere, is essential for the interpretation of the first four suggested guidelines.

Mr Chairman,

The Nordic countries have noted with interest the proposed new Guideline 7. We welcome the emphasis on prudence and caution before undertaking any activities aimed at intentional

large-scale modification of the atmosphere. The Paris Agreement will soon enter into force, and we see that there may be a nexus between this provision and measures that States should put in place to mitigate climate change. We therefore welcome further discussion on this Guideline at the next session of the ILC.

Mr Chairman,

The need to protect the atmosphere from specific substances and from pollution from point sources has long been a topic of discussion in the context of international regulation. However, this is the first time that a general framework for the protection of the atmosphere from pollution and degradation is proposed. The Nordic countries are hopeful that the guidelines the Commission is developing will bring added value to the environmental law regime, acknowledging work already concluded as well as existing treaties, while at the same time neither interfering with or duplicating relevant political negotiations.

Mr Chairman,

Turning to the topic of “Jus Cogens” the Nordic countries would like to thank Special Rapporteur Dire Tladi for his first report which covers a number of pertinent and important questions.

It is still early in the Commission’s consideration of this topic, so we will limit our remarks on this issue to a few comments.

Firstly, we share the assessment of the Special Rapporteur that it is probably not advisable to seek to elaborate a list of jus cogens norms. We find it more useful to focus on the conceptual aspects of the topic, rather than risking being bogged down in lengthy discussions on which specific norms that may have gained status as jus cogens. Moreover, such a list may potentially have a negative impact on the status of equal important norms not included in the list, and may affect the dynamic development of legal norms.

Secondly, on the issue of regional jus cogens norms, we generally consider the concept to be difficult to reconcile with the universal and unconditional character normally ascribed to jus cogens. Similarly, we find the notion of persistent objector not to be compatible with the concept of jus cogens.

As a third point, we question the necessity of referring to “the values of the international community” as in draft conclusion 3 paragraph 2, or any other attempt at a definition in substance, as jus cogens represents norms accepted as such by the whole international community. Furthermore, that particular suggested definition could risk excluding certain other norms which should fall within its scope.

Finally, as to the question of the outcome of the Commission’s consideration of the present topic, we note that there was general support from members of the Commission for the elaboration of conclusions, while some thought it favourable for the Commission to determine the form of outcome after the analysis had been done. While we do not object to the elaboration of conclusions, we continue to note that this topic in our view is best dealt with by the Commission through a conceptual and analytical approach rather than with a view to elaborating a new normative framework for states.

I thank you, Mr. Chairman