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Report of the International Law Commission
(Chapters X, XI and XII)

Statement by the Nordic countries:
Denmark, Finland, Iceland, Norway and Sweden

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Mr. Chairman,

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

Mr. Chairman,

Experience shows that armed conflicts not only cause severe human suffering and extensive damage to civilian property and infrastructure, but also widespread destruction and

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degradation of the environment. The consequences are often severe, wide-reaching and long-lasting, both for nature itself and for civilian populations who depend on natural resources for their survival.

For this reason, the Nordic countries have long worked to enhance the protection of the environment before, during and as after armed conflict. In this context, we welcome the adoption of the resolution on the Protection of the Environment in areas affected by Armed Conflict at UN Environment Assembly II, including the call therein for States to implement all relevant international law. We believe a clarification of relevant existing rules and principles of international law may help us to achieve this aim.

Mr. Chairman,

We would like to start by expressing our gratitude to Special Rapporteur Dr. Marie Jacobsson for all her work on this issue over the last years. We would also like to commend her for the very well-prepared and thorough third report to the Commission, which includes 9 draft principles on enhancing the protection of the environment in relation to armed conflicts. The Nordic countries also welcome the provisional adoption of the 9 draft principles applicable during armed conflict with commentaries that the Commission discussed last year.

The Nordic countries would like to take this opportunity to express our general support for the third report and draft principles as presented, which we believe have formed a good basis for the discussions on this issue. We note with appreciation that the Drafting Committee of the Commission has provisionally adopted 9 draft principles on the basis of the 9 draft principles proposed by the Special Rapporteur. We look forward to the adoption by the Commission of these draft principles together with commentaries next year.

In particular, we would like to emphasize the central importance of draft principle 4 which addresses national implementation and enforcement of international law. According to this draft principle, States should take all necessary steps to adopt effective legislative, administrative, judicial or other preventive measures to enhance the protection of the environment in relation to armed conflict – in conformity with international law.

While there may be different views on the exact scope and content of current international law obligations as regards the protection of the environment in situations of armed conflict, all States have an obligation to respect, and ensure respect for their obligations under international humanitarian law.

There can be little doubt that the full and faithful implementation of the existing rules and principles of international humanitarian law would be an important first step in enhancing the protection of the environment in relation to armed conflicts.

Let me also thank Dr. Jacobsson for including a number of other important issues in the draft principles. Among these, I would like to briefly highlight some of the new proposals that have been put forward and provisionally adopted by the Drafting Committee, such as draft principle 8 on the environmental impact related to international peace operations, and draft principle 14, in which parties to a conflict are encouraged to settle matters relating to the restoration and protection of the environment in their peace agreements. We believe these proposals merit further discussion.

Finally, Mr. Chairman,

Let me, on behalf of the Nordic Countries; assure the Commission and its next Special Rapporteur on this subject of our full support to the continued work on this very important

issue in the years to come. We appreciate the efforts made by Dr. Jacobsson to ensure a smooth handing over to her successor.

I will now turn to Chapter XI of the report, which deals with Immunity of State officials from foreign criminal jurisdiction.

The Nordic countries would like to thank the Special Rapporteur, Ms. Concepción Escobar Hernández, for her fifth report focusing on limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. The report addresses issues that have been the subject of recurrent debate in the ILC and in the Sixth Committee.

Mr. Chairman,

In essence, Chapter XI addresses limitations and exceptions to immunity before national jurisdictions for core international crimes.

First, we fully agree with the Special Rapporteur's conclusion that limitations and exceptions to the immunity of State officials clearly apply in the context of immunity *ratione materiae* for core international crimes. This is the case not only in relation to international tribunals but also in national jurisdictions. We also support the inclusion of genocide, crimes against humanity, war crimes, torture and enforced disappearances as categories of crimes to which immunity *ratione materiae* does not apply. At the same time, we do not rule out the possibility of adding other categories of crimes to this list.

Second, as to the theoretical distinction between the terms 'limitation' and 'exception', we support the approach suggested by the Special Rapporteur. Through the use of the simple

phrase 'immunity shall not apply', the proposal cuts through the theoretical aspects of the nature of immunity and establishes a clear rule.

Third, the Nordic countries welcome the thorough debate on the topic of exceptions from immunity before national jurisdictions that has been initiated by the Commission and will be continued next year. As to the subject matter of this discussion, we support the view that the finding of the International Court of Justice in the Arrest Warrant case should be construed narrowly, relating specifically to immunity *ratione personae*. However, the Nordic countries reiterate our view that for crimes such as genocide, crimes against humanity and war crimes, no rules of immunity should apply in national jurisdictions. We simply do not see any rational need to uphold immunity for State officials in foreign jurisdictions in connection with such crimes.

In this respect we put particular emphasis on the importance of legal consistency with the rules pertaining to immunity before international courts, in particular the regime established by the Rome Statute of the International Criminal Court. We refer in particular to article 27 of the Rome Statute, which now reflects a well-established norm of international law. While recognizing the differing rules of international law regarding exceptions to immunity in national jurisdictions in relation to *ratione personae* and *ratione materiae* respectively, we encourage the Commission to consider article 27 by including the phrase 'without any distinction based on official capacity'.

Fourth, the Nordic countries fully support the inclusion of a 'without prejudice' clause explicitly referring to cooperation obligations that may arise from other regimes to which a State is bound.

Mr. Chairman,

The sixth report of the Special Rapporteur in 2017 will address procedural aspects of immunity of State officials from foreign criminal jurisdiction.

In this regard, the Nordic countries would like to underline the importance of procedural safeguards applicable to decisions made by independent prosecutors, in order to ensure that all relevant aspects of cases involving claims of immunity are taken into consideration. The Nordic countries remain firmly convinced that robust mechanisms based on the rule of law are important for safeguarding against proceedings that are politically motivated or an illegitimate exercise of jurisdiction. Key questions are: who should be given authority to make prosecutorial decisions relating to immunity, and how can we ensure that there are control mechanisms in place that guarantee that all relevant factors are considered before decisions of this kind are made.

Mr. Chairman,

Turning to the topic of Provisional application of treaties the Nordic countries would like to thank the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his fourth report on the provisional application of treaties. We 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.

In the fourth report the Rapporteur continues to study the relationship between Article 25 and other provisions of the 1969 Vienna Convention on the Law of Treaties, particularly the Articles in Parts II Reservations, V Invalidity of treaties and termination or suspension of a treaty as a consequence of its breach, and VI Cases of State succession, State responsibility, and outbreak of hostilities. The Nordic countries note that the Rapporteur has also, to a

certain degree, addressed the issue of international responsibility for a breach of a treaty applied provisionally but state that this may require some further study. As stated before, when the Nordic countries agree on applying treaties provisionally, they consider the treaties to produce the same legal effects as if they were formally in force. This same conclusion was stated by the Commission after the third report of the Rapporteur and was reconfirmed by the Rapporteur in his fourth report.

Mr. Chairman,

The Nordic countries find it important that the question of the provisional application of treaties by international organizations has been addressed also in the fourth report. We note with satisfaction that the Rapporteur has gathered and analyzed the practice of multilateral treaty depositaries. This is something that the Nordic countries have called for earlier, as there seems to be variation in the practices. The list included in the addendum clearly shows that it is common to resort to provisional application in respect of cooperation agreements entered into by the EU and its Member States with a third State. The Nordic countries emphasize, however, that the topic should not be considered concluded in relation to international organizations, as there remain questions to be reflected upon.

The Nordic countries welcome the initiative of the Commission to request from the Secretariat a memorandum analyzing State practice in respect of treaties deposited or registered in the last 20 years with the Secretary-General and providing for provisional application, including treaty actions related thereto. It is interesting to note that a large part of the registered actions took place subsequently to the entry into force of the 1969 Vienna Convention.

The Rapporteur has previously gathered comments on State practice, but the number of comments has remained insufficient. The Nordic countries have previously mentioned examples of agreements in respect of which provisional application has been resorted to. Earlier reports quote 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. As we have stated before, whether or not a State resorts to provisional application is essentially a constitutional and policy matter.

Mr. Chairman,

The Nordic countries welcome the new proposal for a guideline 10 on internal law and the observation of the provisional application of all or part of a treaty, presented by the Rapporteur. We also welcome the revised versions of the earlier guidelines, now also presented by the Drafting Committee. We are looking forward to the outcome of the next session of the Commission, during which it is due to take action on the draft guidelines and their commentaries. As noted before by the Nordic countries, draft guidelines have potential to serve as a practical tool for States and international organizations.

The Nordic countries wish to express their support for the continuing work of the Rapporteur on this subject and welcome the planning for the future work as stated by the Rapporteur, including the plans to analyze the provisional application of treaties that enshrine rights of individuals and the plans to propose some model clauses.

We have earlier suggested that it might be useful if the Commission could develop model clauses on provisional application. 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 for bringing the treaty into effect earlier. Model clauses may make it easier to resort to provisional application. We recognize however that this could be challenging due to the differences between national legal systems, as the Rapporteur has pointed out earlier.

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

I thank you, Mr. Chairman.
