

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

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Report of the International Law Commission on the work of its seventieth session

Statement by

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(check against delivery)



Permanent Mission of Finland
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Mr. Chairperson,

At the outset, I would like to thank the International Law Commission for their report and work conducted.

I have the honour to speak on behalf of the five Nordic countries Denmark, Iceland, Norway, Sweden and my own country Finland on the topics covered in Cluster II of the Report of the ILC.

Mr. Chairperson,

I shall start by the topic of Protection of the atmosphere. The Nordic countries welcome the report and the complete set of draft guidelines presented by the Commission. We commend the work of Special Rapporteur Mr Shinya Murase and the Commission, and acknowledge the challenges of maintaining the delicate balance in your work.

We note the Commission's request for comments and observations from governments on the complete set of draft guidelines by 15 December 2018. The Nordic countries will aim to respond to this request and for this reason have chosen to focus here on only three issues: the precautionary principle, the relationship of this topic to broader environmental law, and the concept of common concern.

First: The Nordic countries have previously welcomed the inclusion of draft guideline 7, and the emphasis on prudence and caution before undertaking any activities aimed at intentional large-scale modification of the atmosphere. Here, we would like to underline the close interrelation with draft guidelines 3–6. We would like to stress that the precautionary principle also contains the obligation to refrain from an activity if the consequences and effects on the environment are unclear or cannot be assessed.

Second: International environmental law is a constantly evolving area of law and one of growing importance. In previous statements, the Nordic countries have underlined that the draft guidelines build on and do not duplicate existing international law. In our statement two years ago, we pointed to the forthcoming entry into force of the Paris Agreement and asked for a further discussion on the nexus between the guidelines and obligations under the Paris Agreement. On 4 November, the Paris Agreement will have been in force for two years, and we encourage the Commission to draw on these experiences in the finalisation of its work.

Third: In its report, the Commission has explained why the concept 'common concern of humankind' has not been used and why the Commission has opted for the expression 'a pressing concern of the international community as a whole'. We understand that the Commission wanted to use a factual descriptor rather than a term with legal implications. However, the Paris Agreement clearly refers to climate change as a 'common concern of humankind', and other international instruments also use the concept. The Nordic countries would like to encourage the Commission to elaborate on the implications of the legal concept of 'common concern of humankind' in the context of environmental law on the protection of the atmosphere. This may be beneficial for both the specific issue and the definition of the concept itself.

Mr. Chairperson,

Now turning to the topic of provisional application of treaties.

The Nordic countries are very pleased about the progress made at this year's session with the adoption on first reading by the Commission of the "Guide to Provisional Application of Treaties", which includes twelve draft guidelines and commentaries thereto. The Nordic countries continue to support the efforts of the Special Rapporteur and the Commission on this subject.

The Nordic countries welcome the Special Rapporteur's proposal for model clauses on provisional application. We believe that such clauses would be of practical assistance when formulating final provisions of treaties. A closer review of the relationship between the model clauses and the guidelines could however be called for, taking into account their partly overlapping nature.

Mr. Chairperson,

Let me now turn to some more specific comments on the draft guidelines 6 on legal effect of provisional application, 7 on reservations, and 9 on termination and suspension of provisional application.

The revised wording of guideline 6 takes into account the distinction made in the Vienna Convention on the Law of Treaties between provisional application and entry into force. The Nordic countries can agree with this solution and the fact that the wording allows for the termination and suspension of provisional application in line with Part V, Section 3, of the Convention (*mutatis mutandis*).

The Nordic countries also welcome the Commission's work on the use of reservations in relation to provisional application. Any reservation in relation to provisional application should be made in accordance with the relevant rules of the Vienna Convention. The possibility to make a reservation to exclude or modify the legal effect produced by the provisional application of a treaty might increase the willingness to apply the treaty provisionally by states that would make a reservation to the treaty when expressing consent to be bound. A review of the practical impacts of draft guideline 7 might however be useful in the further work on the subject.

Although the practice on termination and suspension of provisional application is scarce, the Nordic countries note with interest draft guideline 9 and in particular its paragraph 3 on termination and suspension not only in the case of a material breach but with a *mutatis mutandis* reference to Part V, Section 3 of the Vienna Convention. The reference will guide future practice in the area, and clarifies the relationship between Article 25 and Part V, Section 3 of the Convention. The specific reference to Part V, Section 3 also complies with the principle of legal certainty.

The Nordic countries are looking forward to the second reading of the Commission on this topic and will be providing written comments and observations to the Secretary-General by 15 December 2019.

Mr. Chairperson,

As a last topic, I will now turn to chapter VIII of the Commission's Report, which focuses on the peremptory norms of general international law (*jus cogens*). This is an important topic with potential significant effects on the understanding of international law as a legal system.

The Nordic countries would like to thank Special Rapporteur, Mr. Dire Tladi for his third report, which considers the consequences and legal effects of peremptory norms (*jus cogens*).

Allow me firstly to make a brief comment on the organization of work within the ILC on this topic, where we understand that the draft conclusions remain in the ILC Drafting Committee until a full set of conclusions and commentaries has been completed and can be presented to the ILC. We are aware that

this has been done also in relation to other topics, but we are concerned about this method perhaps hampering the best exchange of views between the ILC and the Member States. We foresee that this method results in a very significant body of work only being presented to the ILC and the Sixth Committee at the time of the first reading, which will make its thorough analysis difficult. Especially with a topic of this significance and weight, the Nordic countries would appreciate opportunities to meaningful interaction with the ILC during the whole span of the work on a topic.

On the substance, the Nordic countries continue to hold the view that the topic 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. In this context we appreciate the input to the draft articles, given orally by the Commission members as reflected in this year's report, and agree with a focus of keeping the conclusions closely aligned with established and well-founded interpretations on the consequences and effects of jus cogens norms. There is relatively little practice on jus cogens and we support a cautious approach.

This time we would like to touch briefly on a few issues in the third report of the Special Rapporteur. We are pleased with the clear statement in paragraph 3 of draft conclusion 15 that the persistent objector rule does not apply to jus cogens norms. Also the inclusion of draft conclusion 17 on "Binding resolutions of international organizations" appears well-founded.

As to the plans of the Special Rapporteur for future work on the topic we reiterate our reservations against a list of jus cogens norms. We also remain unconvinced about the possibility to reconcile "regional jus cogens" with the notion of jus cogens as peremptory norms of general international law. We look forward to engaging in a more substantial discussion of specific draft conclusions and commentaries at a later stage.

Thank you, Mr. Chairperson