



PERMANENT MISSION OF FINLAND TO THE UNITED NATIONS
866 UN PLAZA, SUITE 222, NEW YORK, NY 10017 - TEL. 1-212-355-2100 - FAX 1-212-759-6156

Statement by Finland on behalf of the Nordic Countries
(Denmark, Finland, Iceland, Norway and Sweden) at the
International Law Commission Cluster 1

Statement by

Ambassador Marja Lehto
Senior Expert, Ministry for Foreign Affairs of Finland

New York, 24 October 2016

(check against delivery)

Mr Chairman,

I have the honour to speak on behalf of the five Nordic countries Denmark, Iceland, Norway, Sweden and my own country Finland on Cluster 1 of the ILC report.

The Nordic countries commend President Commissário Afonso and the members of the ILC for yet another fruitful session. We will in this intervention comment on Chapters IV, V, VI and XIII of the report.

Mr Chairman,

The Nordic countries commend the ILC and its special rapporteur Mr Eduardo Valencia-Ospina for the finalization of the work on Protection of persons in the event of disasters.

The draft articles constitute a comprehensive framework for the reduction of risks of disasters, including through risk assessments, and protection of persons, and set out the duty of the affected state to ensure protection, as well as the role of external assistance in this respect.

The draft articles highlight, in this regard, the principles of human dignity and human rights, cooperation and respect for sovereignty while underlining that response to disasters shall take place in accordance with the principles of humanity, impartiality, neutrality and independence. In this context, the Nordic countries would like to point out that integration of a gender perspective in humanitarian assistance is necessary to reach all parts of the population. It ensures effective and impartial humanitarian assistance and strengthens protection of individuals during times of natural disasters. We wish to recall in this respect the recent report by the International Federation of the Red Cross and Red Crescent highlighting increased risk of sexual and gender based violence in disasters and other emergencies.

The draft articles strike an adequate balance between the rights and obligations of the affected state and those of the assisting actors.

The provision of external assistance in general requires the consent of the affected State. But such external assistance shall not be withheld arbitrarily.

As stated in the commentary to draft article 13, this reflects the dual nature of sovereignty as entailing both rights and obligations. As further stated in the commentary, an offer of assistance that is met with refusal might under certain conditions constitute a violation of the right to life. The ILC also refers in the commentary to the reaffirmation by the Security Council in its resolution 2139 (2014) on the conflict in Syria, that arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, can constitute a violation of international humanitarian law.

The commentary contains important explanations as to the notion of "arbitrarily" in paragraph 2 of draft article 13. The ILC concludes that where an offer of assistance is made in accordance with the draft articles there would be a strong inference that a decision to withhold consent is arbitrary.

The commentary also refers to the guidance document by the OCHA, which lays down that consent is withheld arbitrarily if it is done in a manner that is unreasonable, unjust, lacking in predictability or is otherwise inappropriate.

Another important aspect of the draft articles is the affirmation that states have a duty to take appropriate measures to reduce disaster risks, laid down in draft article 9.

The Nordic countries note the suggestion by the ILC that an international convention is concluded on the basis of the draft articles. We are open to discuss this proposal.

Mr Chairman,

Turning to the topic of "Identification of Customary International Law" the Nordic countries would like to thank Special Rapporteur Michael Wood for his fourth report, which, once again, is substantive and thoughtful.

We would also like to thank the Commission for the further drafting work and for the adoption of the draft conclusions with commentaries. The Commission has after first reading requested states to submit written commentaries and observations to the Secretary General before 1 January 2018.

The Nordic countries will certainly provide such written submissions, but allow me also to make a few comments here today regarding this important topic, which – although theoretical in nature – is of significant practical importance.

Firstly, we want to commend the rapporteur and Commission for elaborating further the comments on the concept of *opinio juris* - "acceptance as law". Although there may be instances where the same evidence might be used to ascertain both practice and *opinio juris*, this does not remove the need to clearly distinguish and identify the evidence for the two constituent elements. We support the explicit mentioning hereof in the draft conclusion. As noted, *opinio juris* must be separated from other, "extralegal" motives for action such as comity, political expedience or convenience which may drive action or inaction of states. This, as noted, requires an analysis of the context of practice in question taking all relevant aspects into consideration.

Secondly, we would like to recall the comments made last year by the Nordic countries regarding the notion of persistent objector. Thus, we welcome the inclusion of the persistent objector rule, which entails that in certain circumstances a customary rule may not be applicable to particular states. Particular concern must in this context be had for the category of rules to which a state objects, and consideration must be given to universal respect for fundamental rules, particularly those for the protection of individuals.

Thirdly, we appreciate that the draft commentary on conclusion 12 regarding resolutions of international organisations has been expanded, and note the special character of the UN General Assembly as a plenary organ of nearly universal participation. However, we believe that the unique characteristics of the UN General Assembly could be further elaborated on in the commentary to this conclusion. We will revert to this aspect in our written contribution.

In conclusion, we once again would like to thank Special Rapporteur Michael Wood and the Commission for the work undertaken so far. These conclusions will undoubtedly become a useful tool for practitioners when engaging in the often difficult task of precisely identifying the existence and scope of customary law, and we look forward to their further refinement through the forthcoming input from and dialogue with states.

Mr Chairman,

The Nordic countries commend the work of special rapporteur Georg Nolte and welcome the further progress on the item Subsequent agreements and subsequent practice in relation to treaty interpretation. With regard to the newly adopted conclusion 13 [12] on pronouncement of expert treaty bodies, the Nordic countries refer back to our substantive statement on this issue last year.

As is clear from the report such expert treaty bodies vary greatly in function and legal expertise.

As stated in the report, a pronouncement of an expert treaty body cannot, in and of itself, constitute subsequent practice that establishes the agreement of the parties regarding the interpretation of the treaty.

It is correct, furthermore, to state that a pronouncement of a treaty body regarding the interpretation of a treaty may refer, or give rise to a subsequent agreement or subsequent practice by parties themselves. As regards the notion "may give rise to", however, additional tools may be needed to establish that all parties have accepted a particular pronouncement of an expert treaty body as a proper interpretation of the treaty.

As stated in the report, the weight of a general comment of an expert treaty body, for the purpose of interpretation, depends on the applicable rules of the treaty, and on whether the comment reflects a considered view of the legal content of certain provisions of the treaty.

Mr Chairman,

Finally, on Chapter XIII of the ILC report, the Nordic countries take note of the suggestion by the ILC to include in the long-term programme of work the topics of Settlement of international disputes to which international organizations are parties and Succession of States in respect of State responsibility. The Nordic countries consider that the Commission already has a heavy workload on important subjects and we are eagerly waiting for further progress of the work at hand. We, therefore, believe that at present the ILC should focus on finalizing items on the current agenda before taking on new subjects.

Thank you, Mr. Chairman