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Agenda item 78: Report of the International Law Commission on the work of its sixty-sixth session

Statement by Denmark, Finland, Iceland, Norway and Sweden

Delivered by Mr. Jonas Bering Liisberg, Under-Secretary for Legal Affairs, Denmark

(Check against delivery)

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I have the honor to speak on behalf of the five Nordic countries, Finland, Iceland, Norway, Sweden and Denmark. I will in turn be addressing each of the following topics in Part 2 of the ILC report of the 66th Session [A/69/10]: The obligation to extradite or prosecute; Subsequent agreements and subsequent practice in relation to the interpretation of treaties; Protection of the Atmosphere; and finally Immunity of State officials from foreign criminal jurisdiction.

Mr Chairman,

First, I turn to **the obligation to extradite or prosecute**. At the outset the Nordic countries would like to thank the Special Rapporteur for the efforts undertaken as well as the Commission for having finalized its work on this topic. We would also like to thank the Commission for its final report on the topic which we believe contains a good summary of the work done. The report's analysis of the ICJ judgment in Belgium v. Senegal, "Questions relating to the Obligation to Prosecute or Extradite", confirms the key role the obligation to extradite or prosecute plays - together with the closely linked principle of universal jurisdiction - in the enforcement of international criminal law.

As the Commission's work on this topic draws to an end let me underscore our view that the fight against impunity for perpetrators of serious international crimes is an important legal policy objective; not only for the Nordic governments, but also for the international community. The numerous conventions containing provisions on the obligation to extradite or prosecute aim at ensuring that there are no safe havens for such perpetrators and the implementation of these provisions remains as important as ever.

We are aware that divergent views have been expressed, including in the Commission, on a number of important issues, including the question whether the obligation to prosecute or extradite has attained an international customary law status. We had, nevertheless, hoped that the Commission's work on this topic could have yielded more detailed results on the fulfilment of the obligation and thus a stronger basis for the further codification and progressive development of this important principle.

Mr Chairman,

On the topic of **Subsequent agreements and subsequent practice in relation to the interpretation of treaties** we again thank the Commission for having produced a second report, and we welcome the conclusions adopted by the Commission. The Nordic countries have taken an interest in the topic of interpretation of treaties and you may recall that we have previously underlined the importance of uniform and coherent interpretation of treaties.

As noted by the Commission subsequent agreements and subsequent practice can take a variety of forms. As an example, general comments and views expressed in individual cases by treaty bodies consisting of independent experts should be of great importance for States' implementation and interpretation of international conventions at national level and be used actively in the work to follow up conventions at national level. However, such comments and views should be regarded as means of interpretation. They should not be regarded as legally binding or as having the purpose of amending a treaty.

Mr Chairman,

In relation to draft conclusion 8, it is important to note that the weight of the subsequent agreement or practice as a means of interpretation depends on its clarity and specificity.

We support the requirement in draft conclusion 9 that an agreement under article 31, paragraph 3 (a) and (b) requires the awareness and acceptance of the parties.

We are looking forward to following and contributing to the continued work of the Commission on this topic.

Mr Chairman,

The Nordic Countries have been positive to the inclusion of the topic of **Protection of the Atmosphere** on the Commission's agenda. We would like to thank Special Rapporteur Murase for his work so far. We agree that International Environmental Law is a subject of International Law that is of growing importance and that merits the consideration by the ILC.

As regards the topic in question, the Nordic Countries are of the view that the added value of the work of the Commission would consist in identifying common principles in existing treaties and practice for the protection of the atmosphere. In this regard, we would like to express our support for the 2013 understanding on the scope of the topic and we encourage the Special Rapporteur and the Commission to respect this understanding. We would also like to underline the importance of maintaining the distinction between the atmosphere and air space.

Finally, Mr Chairman,

I will now turn to the last topic to be addressed in this intervention; that of **immunity of State officials from foreign criminal jurisdiction**. The Nordic countries would like to thank the Special Rapporteur, Ms Concepción Escobar Hernández, for her third report on immunity of state officials which focuses in particular on the subjective scope of immunity. We welcome the preparation of two draft articles, defining the term "State official" and the subjective scope of immunity *ratione materiae*, and the Commission's subsequent provisional adoption of them.

We believe that this work represents a further step towards a common understanding of the relevant international legal norms. In contrast to the situation for diplomatic agents and for States as such, there is in this area of international law no general legal text that sets out the immunity regime.

Mr Chairman,

The Special Rapporteur and the Commission continue to pursue an eminently analytical approach where systematic distinctions are drawn between criminal and civil jurisdiction, between immunities *ratione personae* and *ratione materiae* and between different circumstances that may give rise to particular rules of immunity from criminal jurisdiction, such as in the case of special missions. As we have stated in the past, we believe that this has contributed to enhancing our understanding of the various aspects of immunity. At the same time, we underscore the importance of avoiding fragmentation as a result of the outcome of the Commission's work.

As underlined by the Special Rapporteur: "The concept of an *official* is particularly relevant to the topic Immunity of State officials from foreign criminal jurisdiction, because it determines the subjective scope of the topic." We largely agree with the identifying criteria listed in the Special Rapporteur's report and supported by the Commission, and we agree that the individuals who may be termed "State officials" for the purpose of immunity *ratione materiae* will have to be determined on a case-by-case basis.

As the definition indicates, there needs to be a specific link between the State and the official; there must be a representation of the State or the exercise of State functions. The character of the act in question will be the determining factor. For certain members of Government or other key senior official who represents the State on the international level as a regular part of his or her functions, and which do not fall within the troika who enjoy immunity *ratione personae*, we believe there could be a presumption that they act on behalf of the State. But, again, circumstances must be considered in each case if they point to a different result, when relevant.

Mr Chairman,

Keeping in mind that the Special Rapporteur will address the exceptions to immunity in her next report, we wish to reiterate that 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, effectively turning them into rules of impunity.

We look forward to exploring evidence for the identification of prospective customary international law on this account, taking into consideration landmark treaties and international jurisprudence in this field, reaching back to the Nuremberg and Tokyo tribunals. In our view, it is reasonable to suggest that crimes such as the crime of genocide, crimes against humanity and serious war crimes should not be included in any definition of acts constituting immunity from the start.

We are, however, ready to discuss these and other aspects of the exceptions to immunity in depth next year, and look forward to seeing the next report of the Special Rapporteur.

I thank you, Mr. Chairman.