

**Statement on behalf of
Denmark, Finland, Iceland, Sweden and Norway
78th Session
of the General Assembly of the United Nations**

6th Committee

Agenda item 79:

**Report of the International Law Commission on the
work of its seventy-third and seventy-fourth session
(Cluster I)**

**Delivered by: Under-Secretary of State for Legal
Affairs, Denmark**

New York

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Mr. Chair,

I have the honour to speak on behalf of the five Nordic countries - Finland, Iceland, Norway, Sweden - and my own country - Denmark. Before I comment on the topics covered in Cluster I of the report, we would like to use this opportunity to also make some general remarks regarding chapters I, II, III and X of the Report.

First, we want to reiterate our deep appreciation of the work of the International Law Commission and the Commission's contribution to the progressive development and codification of international law in accordance with its mandate. We welcome the Commission's Report on the work of its seventy-fourth session.

The new Commission of course continued working on the topics that had been initiated during the term of the previous Commission. We were pleased to see that the topic "General principles of law" is now through the first reading and we look forward to providing joint written comments on the draft conclusions and their commentaries next year. We took note of the decision of the Commission to reflect on the way forward regarding the topic "Succession of States in respect of State responsibility". We would like to thank Professor Pavel Sturma, who is no longer with the Commission, for his efforts as the Special Rapporteur on this topic. The topic "Sea-level rise in relation to international law" is advancing towards completion. This work of the Commission has great practical significance for States, as indicated, among other things, by the increased climate change related litigation before different courts and tribunals." We look forward to continued collaboration with the Commission on this important topic.

We have read with interest the first reports on the three new topics and we look forward to commenting on them for the first time. We are pleased to see that the topic "Non-legally binding international agreements" was included in the Commission's programme of work and we congratulate Professor Mathias Forteau for his appointment as the Special Rapporteur for this topic.

The Nordic countries have taken note of all the requests for information contained in Chapter III of the Report. Examples of State practice are particularly pertinent for many of

the topics currently under consideration, and the Nordic countries will make every effort to provide the Commission with relevant information, where available, and encourage other States to do the same. We feel that this year it is particularly important that states provide comments on the draft articles on immunity of states from foreign criminal jurisdiction that are due by 1 December 2023. We look forward to the successful completion of the work of the Commission on this topic under the leadership of Professor Claudio Grossman, the new Special Rapporteur, and thank Professor Concepción Escobar Hernández for the progress achieved during her term as the Special Rapporteur on the topic.

Mr Chair,

I will now turn to the topic of “General principles of law”.

On behalf of the Nordic countries, I would like to congratulate the International Law Commission for having adopted the draft conclusions on general principles of law and commentaries thereto on first reading. I would also like to thank the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, for his diligent work on the topic that complements the Commission’s earlier work on the primary sources of international law.

Overall, the Nordic countries subscribe to the general approach of the Special Rapporteur. We would like to recall our previous statements on this topic, where we have stated among other things that a cautious approach is warranted given the significance of the topic and the many sensitivities at play.

The Nordic countries would like to provide the following comments at this point. We also intend to respond to the Commission’s request for written comments and observations on the first reading result on this topic by 1 December 2024.

First of all, we commend the thoroughness of the Special Rapporteur’s work and the broad survey of relevant State practice, jurisprudence and teachings. It is imperative that the Commission’s work on this topic remains sufficiently anchored in solid evidence of the existence and content of this primary source of international law. We would like to stress

the importance that the conclusions drawn are adequately related to the practice and opinion of States, and that the work on this topic avoids an overreliance on subsidiary means for the determination of law, in the form of judicial decisions and the opinions of individual writers.

The Nordic countries agree that there is no formal hierarchy between the primary sources of international law. However, we must also stress that general principles of law in practice play a subsidiary role, mainly as a means of interpretation, filling gaps or avoiding situations of non liquet. The ICJ has only rarely referred explicitly to principles of international law and, primarily, in the context of procedural obligations rather than substantive law obligations.

In light of cases cited in the third report of the Special Rapporteur, we would like to stress that the invocation of the term ‘principle’ in the course of a legal argument does not necessarily mean that this term is invoked in a legal sense, as a reference to a legal source of its own, or that it supports the existence of a certain principle as a legal source of its own.

The Nordic countries would like to stress the importance of distinguishing clearly and systematically between practice supporting the existence of a general principle, or general principles as a source of law, and cases where invocation of the term ‘principle’ may not be intended or justifiable as a reference to a general principle within the meaning of article 38 (1) c of the Statute of the ICJ.

As for the terminology in draft conclusion 2 and draft conclusion 7, paragraph 1, the Nordic countries would like to repeat our previous position that the term “international community of States” seems clearer and more up to date than the term “community of nations”.

The Nordic countries agree with draft conclusion 3, that general principles may either be derived from national legal systems or formed within the international legal system. We would, however, prefer more instances of state practice and *opinio juris* in the commentary, to support the conclusions drawn in this draft conclusion, particularly as regards its subparagraph b. The Nordic countries also agree with the suggested two-step approach to

the identification of general principles derived from national legal systems, enshrined in draft conclusions 4, 5 and 6. We note the importance of the second criterion in draft conclusion 4, namely that the principle derived from national legal systems must be transposable to the international legal system.

Moreover, we agree that general principles of law may also emanate directly from the international legal system, as highlighted by draft conclusion 7. We do, however, consider that there is a certain inconsistency between the formulations in paragraphs 1 and 2 of the latter draft conclusion. Paragraph 1 proposes as a condition for the determination of a general principle of law that the community of nations has recognized the principle as intrinsic to the international legal system. Paragraph 2, on the other hand, envisions a possible existence of general principles of law formed within the international legal system on conditions other than those referred to in paragraph 1. This appears to have the effect of actually watering down the condition inserted in paragraph 1. The Nordic countries support the approach taken in draft conclusion 7 paragraph 1, that a general principle of law emanating from the international legal system has to be recognized by the international community of nations as intrinsic to the international legal system. This indicates a high threshold – and rightly so.

The Nordic countries agree with the basic assertions in draft conclusions 8 and 9 that judicial decisions and teachings of the most highly qualified publicists may serve as subsidiary means for the determination of general principles of international law. However, we continue to hold the view that the inclusion of these as separate draft conclusions is unnecessary and inappropriate. The relevance of judicial decisions and teachings in the determination of international law is a matter best dealt with in the context of a work specifically dedicated to those subsidiary means for the determination of rules of law, which is in fact included in the Commission's programme of work. The Nordic countries welcome the proposed formulation of draft conclusion 10 as an accurate reflection of the actual function of general principles of law in international legal practice, namely the residual character of this source of international law and its potential relevance in contributing to coherence of the international legal system. We encourage the Special Rapporteur and the Commission to consider whether it would be better to highlight the particular traits

identified in draft conclusion 10, paragraph 2, letter a and b, in the commentaries, rather than identifying them in the text of a draft conclusion, as these traits are common to all primary sources.

The Nordic countries also welcome the proposed structure and formulation of draft conclusion 11. We believe that this offers an accurate reflection of the basic interplay between general principles of law and the other primary sources of law, namely treaties and customary international law. Considering the residual role of general principles referred to earlier in our statement, and the fact that the primary sources are, in fact, commonly operationalized in successive order, we would prefer if this were better reflected in this conclusion's paragraph 1. This could, for example, be done by adding the word "formal" before hierarchical, so that it would read: "General principles of law, as a source of international law are not in a formal hierarchical relationship with treaties and customary international law".

Finally, let me add that the Nordic countries support the proposed outcome of this process, namely draft conclusions accompanied by commentaries.

We look forward to the continued collaboration with the Commission as it progresses its work on this topic.

Thank you.

Mr. Chair,

I will now turn to the topic of "Sea-level rise in international law".

The Nordics continue to support the work of the Commission on this highly relevant topic. We thank the Co-chairs, all five of them, as well as all members of the Study Group for their continued work. We especially thank Mr. Bogdan Aurescu and Ms. Nilufer Oral for their additional work this year, on aspects concerning the law of the sea.

Mr. Chair,

The season during June to August 2023 was the hottest on record. Glaciers in the Arctic and elsewhere are melting. There is no denying the scientific fact that sea level rise is taking place and it will change the world as we know it. Humanity has to mitigate and adapt to this new reality, and that includes finding appropriate solutions in the realm of international law. Finding workable solutions is the joint responsibility of all states, and certainly not only the responsibility of those that will be hardest hit. It is well known that among those facing the most serious consequences of sea-level rise are those who call Small Island Developing States, low-lying atolls and coastal zones their home. Responses such as the Rising Nations Initiative and the Coalition on Addressing Sea-level Rise & Existential Threats speak to the seriousness of an actual existential threat faced by the people and States in question.

The Intergovernmental Panel on Climate Change tells us that sea levels are sure to keep rising well beyond the year 2100. The magnitude and rate of sea-level rise will, however, depend on how fast emissions will be reduced. This is why the world needs ambitious climate action, to keep global heating below 1.5°C degrees. The Nordics are committed to climate action. Simultaneously we are ready to engage in structured discussions on the legal challenges connected to sea-level rise, and how to meet them. The work of the Commission, set to conclude in 2025, is of value in this endeavour.

Turning now to specific aspects of this topic in the ILC report, the Nordics agree that sea-level rise is of direct relevance to the question of peace and security. Furthermore, although new realities can call for updated terminology and emergence of new concepts, caution should be practiced when using concepts still undefined in international law, such as “specially affected State”.

Mr. Chair.

The issue of “legal stability” in relation to sea-level rise, with a focus on baselines and maritime zones - as covered by both the report and the additional issues paper - stands out as a significant subtopic in the work of the Commission. As referred to by the Co-Chair in the paper, the Nordics have already stressed the importance of predictability and stability in a Sixth Committee statement in 2021. This, however, as documented by the Co-Chair,

was conveyed in a more general context focusing on the United Nations Convention on the Law of the Sea.

To provide further clarity, the Nordics agree that the fixing of baselines or outer limits can indeed provide legal stability, especially for states affected by sea-level rise. This concept, however, needs to be approached with caution, with full respect for the Convention and considering all possible implications, including for existing rights and obligations under international law.

As far as the option of fixed baselines or outer limits of maritime zones is concerned - and as has been highlighted by the Pacific Island Forum and the Alliance of Small Island States – there is no explicit provision in the Convention requiring State parties to update their baselines and outer limits. It is, however, also worth noting the view mentioned in the report of this year, that there is an important difference between legally freezing baselines and not updating them.

The report offers interesting discussion on the point of view that the Commission should not seek to select between permanent and ambulatory approaches as the only legal option with regard to baselines, since the application of either approach may be in conformity with the Convention, and one does not necessarily exclude the other. The Nordics are looking forward to further discussion on this and other aspects regarding baselines and outer limits in the Study Group's final report in 2025.

In a wider context, it is also worth noting where the Convention *does* offer clear signals on permanence and stability of title and rights. A prominent example is Article 76 (9) of the Convention which sets out that coastal states shall deposit with the Secretary General of the United Nations, charts and other relevant information “*permanently* describing the outer limits of its continental shelf”. The Nordic countries believe that all coastal states with a continental shelf are well advised to act on this and deposit such charts and information, if not yet done.

In its work, the Commission should be mindful of legal implications of potential changes to the natural environment, other than those caused by sea-level rise. The formation of new islands due to underwater volcanic eruptions, for example, can also change baselines and the outer limits of maritime zones. To be crystal clear, examples like this one could, of course, not apply to human-made changes to the natural environment, as that would be inconsistent with the Convention.

In terms of practical solutions, the Nordics strongly agree that amending the United Nations Convention on the Law of the Sea, is, to cite the report, “difficult”. Indeed, it would not be advisable to engage in such a process which in any case would not be helpful in terms of resolving the challenges at hand and in time. Keeping in mind the internal balance, as well as the universal and unified character of the Convention, which sets out the legal framework within which all activities in the oceans and seas must be carried out, this option should not be the focus of further work of the Commission. That said, while it is too early to take an affirmative position, the Nordics do not exclude that joint interpretive declarations or other common international legal instruments could be a way of addressing the issue of sea-level rise.

Mr. Chair.

The Co-Chairs have emphasized the importance of further exploring the issue of submerged territories, which is related to both the law of the sea and to statehood. The Nordics support further exploration of this issue, as well as of the principle of self-determination in the context of sea-level rise, to be addressed by the Study Group in 2024.

Lastly and importantly, regarding future work of the Study Group, prioritization of issues for the Commission to address in its final report two years from now, would be recommendable. We are looking forward to further engaging with the members of the ILC and other colleagues over the next two years.