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Agenda item 78
Report of the International Law Commission on

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Identification of customary international law

I would like to commend the Special Rapporteur for the excellent second report on the topic of identification of international customary law. It is a topic, which, although of a quite theoretical nature, is also of great practical importance. We support an outcome in the form of conclusions as the most appropriate tool to assist practitioners, and we value the substantial contribution, Z K L F K W K H & R P P L V V L R Q ¶ V Z R U N K D V D O U H D G

We agree with the approach of the Special Rapporteur and the Commission to focus initially on the two constitutive elements of rules of customary international law. We also agree with the limitations suggested both with regard to the scope of the topic as expressed in the title of the subject as well as the exclusion of the issue of jus cogens from the conclusions.

With regard to draft conclusion 6 we agree that the general standard for the determination of state practice should be whether or not an act is attributable to the state in question. And further, that the standard for attribution should be the same as under the rules of state responsibility. There is, however, a need to exclude for example ultra vires acts which may under the state responsibility rules be attributable to the state in question, but should not serve as evidence towards custom.

We welcome the wording of draft conclusion 7 that practice may take a wide range of forms. As to the question of whether general practice can also be expressed through inaction, as suggested in draft conclusion 7, we would tend to agree that this is the case. We are, however, also of the view that the precise conditions for when this is the case should be further examined, particularly what type of circumstances should exist, and interests be at stake, for inaction to become relevant. Just as action by specially affected states is given particular weight, inaction by specially affected states is correctly given more importance in the draft conclusions.

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With regard to inaction as evidence of acceptance as law as suggested in draft conclusion 11, 3 we again believe that this may be accepted as a general rule, but that the circumstances of when this rule comes into play should be further explored.

Finally on this topic, a note on the role of international organisations in the creation of custom. We are aware that the issue of whether or not international organisations can contribute to the creation of custom will only be addressed in the Special Rapporteu ¶ V W K L U G report. We would, however, already at this point like to express the view that we do believe international organisations can play such a role. That is particularly the case in instances where such organisations have been granted powers by membestates to exercise competence on their behalf in for example international negotiations. Thus, at least where international organisations can be said to act on the international scene on behalf of states it would seem correct to allow for such practice tocontribute to the creation of custom.

Taking into account that some international organisations may act only upon unanimous decisions or have members or bodies with veto powers, it should be explored by the Special Rapporteur whether inaction by an intenational organisation would be of a different nature than inaction by a State with regard to identifying forms of practice in draft conclusion 7 no.

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We would like to start by thanking Special Rapporteur Dr Marie Jacobsson for her preliminary report to the ILC on the protection of the environment in relation to armed conflicts. This is a comprehensive and useful report on Phase I of the topic.

It is well known that modern warfare causes serious damage to the natural environment, and that armed conflict has severe and long-lasting consequences both for nature itself and for civilian populations who depend on natural resources for their survival. Open warfare may result in physical destruction of the natural environment; in addition, related military activities, including large-scale transport and other operations, may pollute soils, destroy plant life and disrupt water flow, disturbing the balance of ecosystems.

The Nordic countries consider it vital to enhance protection of the environment before,

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on the empirical data collected in the report. The conclusions of the expert meeting will be reported to the 32nd International Conference of the Red Cross and Red Crescent, which will take place in 2015.

Provisional application of treaties

As far as provisional application of treaties is concerned, the Nordic countries wish to thank the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his second report which seeks

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The analysis of this topic is likely to identify strengths and weaknesses of different models of provisional application and, therefore, it may be considered whether the Commission´s work would benefit from further analysis of the different models of provisional application. This includes the possibility for a State to unilaterally declare its intention to provisionally apply a treaty when the source for provisional application does not arise from a provision of the treaty itself, a question which was debated by the Commission.

The rapporteur calls for more information on State practice, which will provide him with a representative sample of such practice for drawing conclusions. The Nordic countries have previously mentioned examples of Agreements where provisional application has been resorted to, such as the 2010 General Security Agreement on the Mutual Protection and exchange of Classified Information between the Nordic countries and the 2013 Arms Trade Treaty.

One model of provisional application is the adoption of the decision 1/CMP.8, where the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol recognized that Parties may provisionally apply the Doha Amendment pending its entry into force in accordance with Articles 20 and 21 of the Kyoto Protocol. The Parties intending to provisionally apply the Doha Amendment pending its entry into force in accordance with Articles 20 and 21 of the Protocol may provide notification to the Depositary of their intention to provisionally apply the Amendment. The Nordic countries implement the above mentioned treaties provisionally with the same legal effects as if they had formally been in force.

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 to bring the treaty into early effect. Therefore, it might be useful if the Commission could develop model clauses on provisional application.

The Nordic countries find it important that the question of the provisional application of treaties by international organizations will be addressed as part of the further work on the topic, as it is stated in the second report in accordance with the mandate. For example, it is common that provisional application is resorted to in the cooperation agreements entered into by the EU and its Member States with a third State.

In concluding, we renew our wish to comment on the form of the final outcome of this topic once the work has progressed further.

Thank you, Chair.

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