

Joint Nordic comments and observations on the ILC draft conclusions on identification of customary international law

The Nordic countries, Finland, Iceland, Norway, Sweden and Denmark, would like to express their appreciation to the International Law Commission for the opportunity to submit written comments and observations on the sixteen draft conclusions and commentaries on identification of customary international law, as adopted by the Commission on first reading in 2016.

The Nordic countries are very grateful to the International Law Commission and Special Rapporteur Sir Michael Wood for their work on this important topic. As stated on previous occasions, we believe that an outcome in the form of conclusions is the most appropriate. The conclusions will undoubtedly be very useful guidance for practitioners facing questions of customary international law.

In view of possible further refinement of the draft conclusions, we hereby submit the following comments and observations to the Secretary-General:

We agree with the overall scope of the draft conclusions, namely that they are limited to identification of customary international law, and without focus on the relationship to other sources of international law or *jus cogens*.

We appreciate and support the elaborated comments on the nature and function of the second constituent element "acceptance as law" (*opinio juris*). Even though there may be instances, where the same evidence may be used to ascertain both practice and *opinio juris* ("intertwined in fact"), there is still a requirement to separately assess the evidence for each of these two constituent elements, as now explicitly stated in draft conclusion 3. As noted, *opinio juris* is to be distinguished from other extralegal motives for action, such as comity, political expediency or convenience, as practice solely motivated by such considerations will not amount to rules of customary international law. Therefore, the context of practice must be analysed, taking all relevant aspects into consideration.

Turning to the role of international organizations and the value of their resolutions: We share the view, as expressed in draft conclusion 4, that in certain instances the practice of international organizations can contribute to the formation, or be the expression, of rules of customary international law. That is particularly the case in instances where such organizations have been granted powers by member states to exercise competence on their behalf.

Furthermore, we appreciate the elaboration in the commentary on draft conclusion 12 regarding resolutions of international organizations. We note, as was suggested in the Sixth Committee, the special mention of the General Assembly's relevance, as a forum of near universal participation. As was also stated by Special Rapporteur Sir Michael Wood in his third report, General Assembly resolutions may be particularly relevant as evidence of or impetus for customary international law. However, as the report also notes, caution is required when determining the normative value of such resolutions, since "the General Assembly is a political organ in which it is often far from clear that their acts carry juridical significance". The Nordic countries believe that further elaboration in the commentary on two particular aspects would benefit the discussion of the normative value of General Assembly resolutions: Firstly, a further discussion of the unique characteristics of the UN General Assembly and what sets it apart from

other international organizations. Secondly, the importance of General Assembly resolutions' content and the conditions of their adoption. In other words, are there particular areas where resolutions tend to be expressive of *opinio juris*.

Recalling our comments made in previous years, we welcome the inclusion of the persistent objector rule. The Nordic countries share the view that when a state has persistently objected to an emerging rule of customary international law, and maintained its objection after the rule has crystallized, that rule is not opposable to it. Particular attention must in this context be paid to the category of a rule to which a state objects, and consideration must be given to universal respect for fundamental rules, particularly those for the protection of individuals. We also share the view that once a rule of customary international law has come into being, an objection will not avail a State other than a persistent objector wishing to exempt itself. Finally, we concur with the commentary in that the inclusion of a draft conclusion on persistent objector is without prejudice to any issue of *jus cogens*.

Finally, regarding the issue of particular customary international law: We concur with the Commission's use of this term instead of "particular custom" in order to emphasize that draft conclusion 16 is also concerned with rules of law, not mere customs or usages. As noted, there may indeed be local customs among states that do not amount to rules of international law. We agree that a measure of geographical affinity usually exists between states among which a rule of particular customary international law applies. We do not rule out that in principle particular customary international law can develop among states linked by other common causes, interests or activities. However, we find it important to emphasize that such common denominators should be very clearly identifiable among the states concerned. The importance of clarity also applies to the general practice and its acceptance as law. In this context, we agree that the practice must be general in the sense that it is a consistent practice among the states concerned and that each of these states must have accepted the practice as law among themselves.

The Nordic countries would like to once again thank the International Law Commission and Special Rapporteur Sir Michael Wood for the important work undertaken on this topic until now. We hope the above comments and observations will be of value to the further refinement of the draft conclusions and commentaries.