PERMANENT MISSION OF NORWAY
TO THE UNITED NATIONS

Joint Nordic comments on the International Law Commission's Draft articles on Immunity of State officials from foreign criminal jurisdiction

I. Introduction

The Nordic countries, Denmark, Finland, Iceland, Norway, and Sweden, commend the work of the International Law Commission (ILC), which at its 73rd Session (2022) adopted, on first reading, 18 draft articles and a draft annex on immunity of State officials from foreign criminal jurisdiction, together with commentaries thereto (hereinafter referred to as 'articles').

The Nordic countries refer to our previous comments made in statements in the Sixth Committee and our written submissions to the ILC and hereby, in view of the request by the ILC in its 2022 report, A/77/10, chapter. VI, para. 66, that comments and observations to the articles be submitted to the Secretary-General by 1 December 2023, submit the following comments to the Secretary-General.

Rules on the immunity of State officials from foreign criminal jurisdiction have for long been part of customary international law. In contrast to the situation for diplomatic agents and for States as such, there is no general legal text that sets out the immunity regime relative to State officials. We believe that the work of the ILC represents a significant step towards a common understanding of the international legal norms applicable in this matter.

The ILC has informed that it has sought to deliver a product that can form the basis for negotiations of a treaty. Being cognizant that most of the proposed draft articles reflect customary international law and are as such already binding on states without treaty codification, the Nordic countries agree that the final draft articles could indeed constitute the basis for negotiating a treaty on the immunity of State officials from foreign criminal jurisdiction.

The concept of immunity is closely linked to the principle of sovereign equality of States. International law reflects these principles in its prescription to States

not to claim jurisdiction over another sovereign State. Bearing in mind the principle of sovereign equality of States it can be noted that customary rules regarding immunity develop in line with what is necessary and functional in the exercise of international relations. Customary law is not static, and it may change in line with the practice of States and their recognition of it. The draft articles of the ILC encompass the developments over the last decades in this regard, in particular considering the relation between international criminal law and the customary rules of immunity of State officials from foreign criminal jurisdiction, as reflected i.a. in article 7 of the draft articles.

Having the entire set of draft articles before us, it is the view of the Nordic countries that the ILC has succeeded in drafting what is broadly a codification of the applicable customary rules, and that the draft has been both satisfactorily structured and adequately detailed. The draft is, in our view, appropriately striking the balance between the interests of the forum State and the State of the official, and in this regard, the procedural provisions of part four of the draft articles are particularly important, considering that they are ensuring adequate safeguards for the State of the official, while also observing the interests of the forum State.

The Nordic countries encourage the ILC to continue its effort on the draft articles so that a final draft may constitute the basis for negotiating a convention on the immunity of State officials from foreign criminal jurisdiction. In this regard, the Nordic countries have the following considerations on the draft articles adopted on first reading.

II. Introductory provisions (articles 1 and 2)

In the view of the Nordic countries articles 1 and 2 adequately define the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction and establish the key elements and definitions of their content. They also draw a useful distinction towards the special rules of international law relating to immunity from foreign criminal jurisdiction.

Furthermore, the Nordic countries are in favour of the explicit reference of article 1, paragraph 3, to the international agreements establishing international criminal courts and tribunals, recognizing the autonomy of the legal regimes applicable to such international criminal courts and tribunals. The clause does not go beyond the remit of the draft articles, nor does it give rise to hierarchical relationships between any rules, but rather merely separates different legal regimes, whose validity and separate fields of application will still be preserved.

The Nordic countries concur with the view that issues relating to immunity before international criminal courts and tribunals remain outside the scope of the present draft articles, as such issues are governed by a legal regime of their own, as stated in the commentary to the draft articles.

As the two terms defined in article 2 mainly relate to immunity ratione materiae and not to immunity ratione personae, it could be considered to move these two definitions to articles 5 and 6 respectively.

The main concern of the Nordic countries regarding the introductory provisions and in particular article 2 on definitions is, however, that the term "criminal jurisdiction" is not defined. The ordinary meaning of this term, and perhaps the first that comes to mind, would be that "criminal jurisdiction" means the act by a court to establish criminal responsibility through criminal proceedings. But several other acts and measures exist as part of the criminal jurisdiction of a state, including governmental, police, investigative and prosecutorial acts and measures. This matter is discussed in the commentaries to article 9, paragraph 5-6 and 11-14, and it is confirmed there that the understanding of "criminal jurisdiction", at least in relation to article 9, should be the broader approach including any acts and measures under a state's criminal jurisdiction. In this regard it could be noted that an approach where "criminal jurisdiction" also includes coercive measures would in practice mean that the rules of immunity also entail inviolability of the official of the other State. An accurate definition of "criminal jurisdiction" as part of the draft articles is hence essential both to the legal and practical scope of these draft articles, not the least for the practitioners that will apply the rules of these articles in their everyday work. It is therefore the understanding of the Nordic countries that the term "criminal jurisdiction" needs to be defined, or explained in another way, in the introductory provisions draft articles and elaborated further in commentaries to this provision.

III. Distinction between ratione personae and ratione materiae (Part Two and Part Three)

The Nordic countries support the systematic distinction drawn between immunities ratione personae and ratione materiae and that such distinction represents two legal regimes and merits two separate parts establishing their specifics.

Nevertheless, the rationale for both these types of immunity follows from the principle of sovereign equality of States and the need to facilitate the maintenance of stable international relations, and they share significant

common elements. Even if elaborated in two separate parts, the Nordic countries therefore think that certain considerations related to one may be observed also when considering the other.

IV. Immunity ratione personae (articles 3 and 4)

The Nordic countries consider the substance of the rules as expressed in the draft articles 3 and 4 on immunity ratione personae to represent long established customary international law and fully support the substance as detailed in these two draft articles.

The Nordic countries agree with the assessments and conclusions of the ILC as set out in paragraph 11-15 of the commentaries that the customary rules on immunity ratione personae as they presently stand cover the Head of State, Head of Government and Minister for foreign affairs.

As to the structure of article 3 and 4, the Nordic countries concur with the approach of dividing the matter in two, firstly defining the persons to whom the immunity ratione personae applies and secondly establishing the substantive and temporal elements. However, the structure and order of the rules of these two articles could merit further consideration. Both paragraphs 1 and 3 of article 4 relate to the temporal elements and could hence have been put after each other as paragraphs 2 and 3. Also, the substantive elements could naturally have been stated before the temporal elements. It could furthermore be considered if there is a need to define the persons to whom the immunity ratione personae applies in a separate article, or if article 3 and 4 could be merged in to one article with four paragraphs.

Alternatively, it could be considered if the temporal element of paragraph 2 could be merged into the paragraph regarding the persons enjoying immunity ratione personae, since the content of the rule will be the same. The first paragraph on immunity ratione personae could simply be put "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction during their term of office", then followed by paragraphs 2 and 3 of article 4.

V. Immunity ratione materiae (articles 5 and 6)

In the same way as described above on article 3 and 4, the Nordic countries consider the substance of the rules elaborated in article 5 and 6 on immunity ratione materiae to represent long established customary international law. These draft articles adequately reflect the normative elements of the rules of

immunity ratione materiae, setting out clearly the material and temporal scope of such immunity and highlighting its basic characteristics, namely that it is granted only in respect of "acts performed in an official capacity" and that it is not time limited. Articles 5 and 6 fully cover the substance of the customary rules of immunity ratione materiae and the Nordic countries endorse the content elaborated in these two draft articles and further described in the commentaries.

The interrelation between article 2, article 5 and article 6 could in the view of the Nordic countries be considered further. As touched upon above, both the terms of article 2 specifically relate to the content of articles 5 and 6. The subject matter of article 5 is to define the persons to whom the immunity ratione materiae applies, and the term "State official" defined in article 2 (a) is the core in this regard. Therefore, it could be considered to move this definition to article 5. Even though "State official" is a term used also in part four, the need for a definition of the term relates to article 5, and the use of the term in part four would remain unaffected by incorporating the definition into article 5. The only substantial use of the term "act performed in an official capacity" defined article 2 (b) is made in article 6, and this could hence merit that the definition is moved to article 6, particularly to make article 6 more accessible. Acts performed in "official capacity" is also mentioned in article 4, paragraph 2, but there is no need for the definition of the term in this relation since article 4, paragraph 2, covers all acts performed, both in private and official capacity. On this basis the two definitions of article 2 could be considered merged into article 5 and 6 respectively.

Furthermore, the Nordic countries believe that it could be considered further if the specification of the persons to whom the immunity ratione materiae applies needs to be separated into an article distinct from the article setting out the subject matter of the immunity ratione materiae rule. The content of the rule would be the same, even if article 5 and article 6, paragraph 1, were merged into the wording "State officials acting as such enjoy immunity ratione materiae from the exercise of foreign criminal jurisdiction with respect to acts performed in an official capacity.".

VI. Exceptions to immunity ratione materiae (article 7)

The Nordic countries support draft article 7. In our view, no rules of immunity should apply in national jurisdictions for the gravest international crimes, and it is important that genocide, crimes against humanity and war crimes are included in the enumeration. At the same time, we do not rule out the

possibility of adding other categories of crimes to this list, nor of expanding list of treaty instruments found in the annex. We wish to recall our commitment to the Rome Statute of the International Criminal Court and underline the importance of harmonizing the draft articles with the Rome Statute. Regarding draft article 7, the Nordic countries also support article 14, paragraph 3. This paragraph establishes specific safeguards for the State of the official when the forum State is considering prosecution for one of the crimes enumerated in draft article 7. The purpose of paragraph 3 is to balance the interests of the States concerned, reducing the potential for political abuse of draft article 7 without overly inhibiting its application in good faith, and the Nordic countries find that the wording of the paragraph succeeds in fulfilling this purpose.

We also support the approach of identifying treaty instruments that define relevant crimes in an annex.

VII. Procedural provisions and safeguards (articles 8 - 18)

The Nordic countries place a high premium on adequate procedural safeguards to avoid politicization and abuse of the exercise of criminal jurisdiction with respect to foreign officials. Only by robust mechanisms based on the rule of law, will foreign officials be protected against politically motivated or otherwise illegitimate proceedings. The Nordic countries appreciate the efforts of the ILC to address the particular issue of procedural safeguards as part of its overall consideration of the procedural aspects of the draft articles and welcome the inclusion of part four to the draft articles.

Various procedural aspects of importance have been reflected in part four of the draft articles, including various procedural steps, requirements on notification and exchange of information, invocation and waiver of immunity, and cooperation between the involved states, as well as procedural rights of the official. Important in this respect are the draft rules regarding a flexible mechanism for consultations and settlement of disputes. We also very much welcome that the right of the State official to benefit from all fair treatment guarantees is thoroughly recognized. It is also crucial that the draft articles take into account the broad variations that exist in national legal systems, inter alia regarding the role of the judiciary and the executive and prosecutorial authorities, and endeavor to ensure that the draft articles are practicable under different circumstances.

As to draft article 8, the Nordic countries find it useful to include an introductory clause on the application of part four. It could be considered,

however, if the term "shall be applicable in relation to any exercise of criminal jurisdiction" is sufficiently broad and accurate in the context of this article. The procedural provisions and steps of part four will be applicable long before the forum State will start to "exercise criminal jurisdiction". Several of the provisions of part four will apply already from the very moment where an instance involving an official of another State occurs. The actions prescribed in article 9 commence "when the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction". Likewise, the actions prescribed in article 10 commence "Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State". The term "to any exercise of criminal jurisdiction" does hence not encompass the initial phase of assessments and steps before the forum State determines to exercise its criminal jurisdiction. The final part of the article seems to try to expand the scope of the article somewhat, stating "including to the determination", but several steps of this part occur even before such determination. This problem is apparently discussed in the commentaries paragraph 2-6 related to draft article 7, and also commented on more broadly in paragraph 7. The discussions of the commentaries may seemingly have been resolved by choosing a different term than "shall be applicable in relation to any exercise of criminal jurisdiction", and what is more important, a different term would be a more logical starting point for the rule set out in article 8. A possible wording of the term might be "be applicable in any instance that may involve the exercise" or the like. The Nordic countries would therefore welcome further deliberations on the wording of this particular term.

Article 10 requires the competent authorities of the forum State to notify the State of the official before taking coercive measures that may affect an official of another State. Considered that the nature of coercive measures in certain circumstances may be particularly urgent, for instance where such measures are needed to prevent imminent threats to life, the Nordic countries would like to request the ILC to assess if there is a need to include an exception to the requirement of notification for urgent needs for coercive measures.

In certain instances, as mentioned above, coercive measures may be initiated urgently. In such instances time may not allow for the invocation of immunity under article 11 to be done by the State of the official. Immunity against coercive measures as prescribed in the draft articles has similarities to the inviolability under diplomatic law, and in state practice related to such inviolability, it is not unusual for the diplomatic agent to invoke the inviolability

directly before the agents of the receiving states, instead of having such invocation made by the sending state. Although, as described in the commentaries paragraph 3, the right to invoke immunity in general rests with the State of the official, the Nordic countries would like to request the ILC to assess if there is a need to include in the article 11, paragraph 1, an exception allowing for the official to invoke the immunity in urgent instances.

The Nordic countries welcome the draft article 14, paragraph 3, holding that it establishes an important link between procedural aspects and the exceptions to immunity of draft article 7. As previously expressed on several occasions, the Nordic countries support draft article 7, and we do see merit in the view that procedural guarantees and safeguards could address some of the concerns that have been expressed regarding draft article 7. The purpose of article 14, paragraph 3, is to balance the interests of the States concerned, reducing the potential for political abuse of draft article 7 without overly inhibiting its application in good faith, and the Nordic countries find that the wording of the paragraph succeeds in fulfilling this purpose. The Nordic countries, therefore, as stated earlier, support the particular procedural safeguards described in draft article 14, paragraph 3.

As stated previously, the Nordic countries hold that the procedural mechanisms proposed in the draft articles should be seen as a whole, balancing the interests of the forum State and the State of the official. In this regard the Nordic countries welcome draft articles 17 on consultations and 18 on settlement of disputes and consider these two provisions to provide a final procedural safeguard. We therefore support their inclusion. The Nordic countries also support the wording of these articles, and in particular paragraph 2 of article 18.

VIII. Final remarks

The Nordic countries congratulate the ILC for the successful conclusion of its first reading of the draft articles and look forward to the continued work of the ILC on this important topic.