

C. Immunity of State officials from foreign criminal jurisdiction

The International Law Commission (ILC) welcomed information on the legislative and judicial practice related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction. In response, the Kingdom of the Netherlands wishes to inform the ILC as follows

The Dutch legal order approaches immunity as an exception to jurisdiction. When exceptions to immunity apply, no exception to jurisdiction will exist. Under Dutch law, the jurisdiction of the courts is restricted by exceptions to jurisdiction as recognised under international law. This general rule is also incorporated in the Dutch penal code (Article 8). In the Dutch legal order, existing exceptions to immunity under international law will be applied. With the exception of the International Crimes Act (Wet Internationale Misdrijven, hereinafter: ICA),¹ which will be discussed below, no further specific laws or regulations exist determining exceptions to the immunity of state officials from Dutch criminal jurisdiction. There is also no relevant case law. Perhaps reference could be made to the case between the 'Stichting "Moeders van Srebrenica"' and the Dutch State and the UN (ELCI:NL:HR.2012:BW1999). Although not discussing immunity of state officials from foreign criminal jurisdiction, it did confirm that the immunity (in this case of the UN) from civil jurisdiction was absolute and that no exception to this immunity existed on the basis of the seriousness of the alleged crimes (peremptory norms).

The ICA, in Section 16 provides, for immunity from criminal jurisdiction under the ICA in case of:

- (a) foreign Heads of State, Heads of Government and Ministers of Foreign Affairs, as long as they are in office, and other persons insofar as their immunity is recognised under customary international law; and
- (b) persons who enjoy immunity under any convention applicable within the Kingdom of the Netherlands.

Section 16 (a) contains rules governing immunity, insofar as based on customary international law. Section 16 (b) deals with claims to immunity based on conventions. Examples of such conventions include the Vienna Convention on Diplomatic Relations of 1961 and the Convention on the Privileges and Immunities of the United Nations of 1946.

The Netherlands further considers that functional immunity does not extend to the commission of international crimes committed by those concerned in their official capacity. See for example the decision of the Court of Appeals of Amsterdam of 20 November 2000, paragraph 4.2 (ELCI:NL:GHAMS:2000:AA8395). This is not so much an exception to immunity but rather a confirmation that functional immunity only applies to acts performed in the course of a person's official (governmental) function and that the commission of international crimes, by definition, cannot be an official function.

Section 16 (a) relates to claims to immunity that are based on customary international law. Foreign Heads of State, Heads of Government and Ministers of Foreign Affairs possess personal immunity as long as they are in office. After such persons have left office, they possess only functional immunity; that is, their immunity relates solely to acts they performed in their official capacity, not to their personal actions. As mentioned above, and in accordance with current trends in the international law relating to functional immunity as outlined above, the Kingdom of the Netherlands considers that the three categories of representatives mentioned in section 16 (a), if they are suspected of having committed international crimes in their official capacity, should not be able to claim immunity successfully once they have left office. In concrete terms, this means that the functional immunity that those concerned enjoy after they have left office will probably not constitute an obstacle to the exercise of jurisdiction by a Dutch court, if a reasonable suspicion exists that they have committed international crimes. Any final decision on this point must be made by the courts. Section 16 (a) is not confined to the three categories of representatives named above. It also includes other individuals insofar as their immunity is recognised under customary international law, such as all participants in official missions enjoy full immunity for the duration of the mission on the basis of customary international law.

¹ See <http://wetten.overheid.nl/BWBR0015252/2006-01-01>