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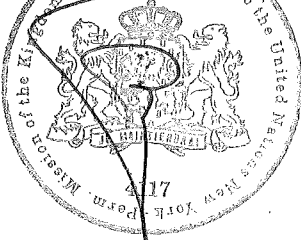
**Our reference**

NYV/2017/090

The Permanent Mission of the Kingdom of the Netherlands to the United Nations presents its compliments to the Secretary-General of the United Nations and submits the following comments in response to the invitation in General Assembly Resolution 70/140, adopted under agenda item 78, operative paragraph 4, regarding the request of the International Law Commission (ILC) for the views of States on the various aspects of the topics on the agenda of the ILC, in particular on all the specific issues identified in chapter III of its report.

The specific issue on which the Kingdom of the Netherlands presents its comments is Immunity of State officials from foreign criminal jurisdiction. The comments presented by the Kingdom of the Netherlands are included in the annex to this Note Verbale.

The Permanent Mission of the Kingdom of the Netherlands to the United Nations avails itself of the opportunity to renew to the Secretary-General of the United Nations its assurances of its highest consideration.



## **ANNEX – Response to requests of the International Law Commission**

### **A. Immunity of State Officials from foreign criminal jurisdiction**

The International Law Commission (ILC) has indicated that it would appreciate being provided by States with information on their national legislation and practice, including judicial and executive practice, with reference to the following five issues. In response, the Kingdom of the Netherlands wishes to inform the ILC as follows.

#### **a. Invocation of immunity**

In its Constitution, the Kingdom of the Netherlands recognises the applicability of international law, including the law of immunities. Under Article 93, treaties and decisions of international organisations with binding force shall become binding in the Dutch legal order after they have been published. In addition, domestic law shall not be applicable when in conflict with provisions of treaties or binding decisions of international organisations that are binding on all persons.

In general, Article 13A of the Act on General Provisions (*Wet Algemene Bepalingen*) states that the jurisdiction of the courts and the execution of judicial decisions and deeds are subject to exceptions recognised in international law. That covers both treaties entered into by the Netherlands and customary international law. These include immunities recognised under international law.

It is thus possible to invoke immunity in the Dutch legal order. With respect to the invocation of immunity of foreign State officials from criminal jurisdiction, there is little relevant practice, since the Public Prosecutor would usually first assess whether any immunities will apply before bringing criminal charges. In 2008, the Supreme Court of the Netherlands decided a case concerning a member of the Afghan security service, who invoked immunity to avoid prosecution. The Supreme Court declined to grant immunity: the status of the defendant did not entitle him to absolute immunity in the Netherlands and the crime he was charged with, the crime of torture, was not to be considered an official act ([ECLI:NL:HR:2008:BC7418](#)).

In 2000, the Court of Appeals of Amsterdam established that, the Kingdom of the Netherlands does not consider an international crime to be part of the official functions of a state official ([ECLI:NL:GHAMS:2000:AA8395](#)).<sup>1</sup> Therefore functional immunity does not extend to the commission of international crimes committed by those concerned in their official capacity. Also relevant is the International Crime Act of the Netherlands (*Wet Internationale Misdriften*). Section 16 of this Act provides for immunity from criminal jurisdiction in case of 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 recognized under customary international law.<sup>2</sup>

#### **b. Waiver**

There is no case law concerning waivers for immunity from criminal jurisdiction in the case of foreign State officials. When investigation into the conduct of a foreign State official such as a diplomat or an indictment is envisaged, the normal practice would be for the Ministry of Foreign Affairs to request the sending State to waive the immunity of its official. Should such a request be denied by the sending State, no prosecution or investigation will take place, but in the case of diplomats and depending on the seriousness of the alleged crime, the Netherlands will consider a declaration of *persona non grata*.

#### **c. The stage at which the national authorities take immunity into consideration**

Foreign State officials can invoke their immunity before Dutch authorities at any stage (investigation, indictment, prosecution). Also, the Public Prosecutor, as well as courts, may consider the applicability

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<sup>1</sup> Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2000:AA8395> paragraph 4.2. For an English translation see: 3 Yearbook of International Humanitarian Law (2000) 677. The Supreme Court has eventually rejected the judgment of the Court of Appeals on the ground that the Torture Convention cannot be applied retroactively.

<sup>2</sup> Available at: <http://wetten.overheid.nl/BWBR0015252/2017-01-01> (article 16).

of immunity at any stage of the proceedings. There is no inherent obligation for courts to consider the application of immunity to a case before them *proprio motu*.

- d. The instruments available to the executive for referring information, legal documents and opinions to the national courts in relation to a case in which immunity is or may be considered

There are no instruments available to the executive for referring information, legal documents and opinions to the national courts in relation to a criminal case in which immunity is or may be considered.

- e. the mechanisms for international legal assistance, cooperation and consultation that State authorities may resort to in relation to a case in which immunity is or may be considered

Apart from international mechanisms provided for by mutual legal assistance treaties, the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*, title X) provides that Dutch authorities may collaborate internationally in joint research, the sharing of documents or exchange of information in a case in which immunity may be considered.<sup>3</sup>

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<sup>3</sup> Available at: <http://wetten.overheid.nl/BWBR0001903/2009-07-01#BoekVierde>