

## **Immunity of State officials from foreign criminal jurisdiction**

The Commission requests States to provide information, by 31 January 2015, on their domestic law and their practice, in particular judicial practice, with reference to the following issues:

### **(a) the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction;**

The Dutch legal system does not define the phrases "official acts" and "acts performed in an official capacity". Instead, a *renvoi* to the meaning given to those terms under international law is inserted in relevant legislation. In accordance with international law, a distinction is made between immunity *ratione personae* and immunity *ratione materiae*. The latter only extends to acts that are official acts or performed in an official capacity. In addition, and also in accordance with international law, immunity *ratione personae* is only granted to persons while in office. Persons previously enjoying immunity *ratione personae* will enjoy immunity *ratione materiae* upon leaving office.

The legal basis for this *renvoi* to international law is found in Article 8(d) of the Dutch Criminal Code and in Article 16 of the International Crimes Act.

Article 8(d) of the Dutch Criminal Code stipulates that the exercise of criminal jurisdiction *ratione personae* is limited by exceptions to such exercise as recognised under international law.

Article 16 of the International Crimes Act similarly excludes the exercise of criminal jurisdiction in the case of international crimes for 1) foreign heads of states, heads of government, and ministers of foreign affairs as long as they are in office as well as all other persons whose immunity is recognised under customary international law; and 2) persons enjoying immunity pursuant to any convention applicable within the Netherlands.

The Dutch legislator expressly opted for the absence of a definition of the term 'official act' or 'acts performed in an official capacity' in order to allow the application of the International Crimes Act to correspond to relevant developments in international law. It should be noted that the government supports the development in the direction of limiting resort to immunity for international crimes and, as result, favours a restrictive interpretation of the term "official act" or "act performed in official capacity" and a broad meaning to be given to the concept of "private acts" or "acts performed in private

capacity”.<sup>1</sup> In accordance with current trends in international law relating to functional immunity, officials suspected of having committed international crimes in their official capacity, should not be able to claim immunity successfully once they have left office. 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, of course, be made by the courts. .

**(b) any exceptions to immunity of State officials from foreign criminal jurisdiction.**

As has been explained above, the exercise of criminal jurisdiction in general is limited *ratione personae* by the rules of international law (Article 8 of the Dutch Criminal Code). Thus, the granting of immunity is considered an exception to the rule of criminal jurisdiction. Immunity will only be granted to State officials if such immunity exists under international law.

While state officials will normally enjoy absolute or functional immunity from criminal jurisdiction when this is prescribed by international law, the International Crimes Act confirms that the granting of immunity in cases concerning international crimes is limited. Under the International Crimes Act, only a limited list of persons will enjoy immunity from criminal jurisdiction when charged with the commission of an international crime:

- Acting Foreign heads of State, foreign Heads of government, Ministers of Foreign affairs;
- All other persons to the extent that they are granted immunities under customary international law;
- Persons enjoying immunity pursuant to any treaty in force in the Netherlands.

The first group of persons is granted immunity *ratione personae* while in office. Foreign Heads of State, Heads of Government and Ministers of Foreign Affairs possess personal immunity as long as they are in office. Personal immunity is absolute, under the prevailing views of international law, since in this respect good relations between States and international stability take precedence over securing punishment for international crimes. 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.

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<sup>1</sup> <https://zoek.officielebekendmakingen.nl/dossier/28337/kst-20022003-28337-108b?resultIndex=4&sorttype=1&sortorder=4> in Dutch only.

The immunity of the second and third group of persons, including in cases concerning international crimes, must be derived from customary international law or a treaty. This includes participants in official missions, who enjoy full immunity for the duration of the mission on the basis of customary international law. This was confirmed by the District Court of The Hague in a case concerning an attempt to prosecute the Head of State of Indonesia during an official visit to the Netherlands. The Court found that he enjoyed absolute immunity from jurisdiction.<sup>2</sup>

Where functional immunity is concerned, there is a marked trend towards giving prosecution for international crimes precedence over functional immunity. This trend, in which the interests served by stable international relations are weighed against those served by combating impunity, with the latter tending to prevail, is strong but not yet fully settled. As has been explained above, persons enjoying functional immunity 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. By way of example, reference could be made to a decision of the Court of Appeals of Amsterdam. This court found that the immunity provided for in Article 16 International Crimes Act did not extend to a deputy minister of national security of Afghanistan who sought refuge in the Netherlands.<sup>3</sup>

The exception to immunity for official acts only applies in the context of the International Crimes Act, and to the scope of that act *ratione materiae*. A list of crimes considered an international crime for the purposes of the International Crimes Act is included in the International Crimes Act. These include the crime of genocide, crimes against humanity, grave breaches of the Geneva Conventions, breaches of the laws and customs of war in international and non-international armed conflict and the crime of torture. In such cases, the plea of immunity will fail except for the persons mentioned above although, again, any final decision on this point must be made by the courts.

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<sup>2</sup> Judgment of District Court The Hague, ECLI:NL:RBSGR:2010:BO0384, para 4.3- 4.4 <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2010:BO0384> (in Dutch).

<sup>3</sup> Supreme Court, Judgment of 8 July 2008, ECLI:NL:PHR:2008:BC7418, para. 10.7, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2008:BC7418>, (in Dutch).