

Kingdom of the Netherlands

The Permanent Mission of the Kingdom of the Netherlands to the United Nations presents its compliments to the Secretary-General of the United Nations.

In response to the invitation following paragraph 66 of the report of the International Law Commission (ILC) for comments and observations to the draft articles on immunity of State officials from foreign criminal jurisdiction, adopted, on first reading, by the ILC at its seventy-third session, the Kingdom of the Netherlands (the Kingdom) would like to make the following remarks.

The Kingdom has requested and received a report of the Advisory Committee on Issues of Public International Law on the draft articles. The Kingdom would like to invite the Secretary-General to take note of this report, dated 30 June 2023, which is annexed to this Note verbale. The Government's response to the advisory report is also annexed to this Note verbale.

The Kingdom would like to make some comments regarding the draft articles in general and in respect of every draft article in particular.

In general, the Kingdom is of the view that neither the draft articles nor the commentaries provide an answer to the questions concerning the immunity of State officials. There is no consensus about the exceptions to and limits of immunity of State officials. In consequence, the ILC has focused in the draft articles on procedural aspects of competence and form. This distracts from the fundamental issues. The topic of immunity of State officials requires a careful approach that does justice to the differing views of States.

The Kingdom would also note that immunity of State officials is not a recent topic. It is therefore a matter of concern that the ILC's proposals have an insufficient basis in the uniform State practice and *opinio juris* that is available concerning the scope and application of immunity and at the same time introduce topics for which no State practice and *opinio juris* exists. The draft articles might therefore be perceived as a progressive development of international law, but the ILC does not present them as such. However, a progressive development of international law should not be necessary for this topic as sufficient State practice is available for the application of immunity law without having to resort to procedural provisions.

In view of the fact that by adopting these draft articles the ILC seems to be aiming for the adoption of a text that can serve as a basis for treaty negotiations, the Kingdom points out that it attaches importance to the codification of immunity law, including the immunity of State officials from foreign criminal jurisdiction. However, before the adoption of extensive and detailed draft articles, it will first be necessary to reach consensus on the fundamental concepts inherent in this topic.

The Kingdom considers that the relevance of many of the proposed draft articles to immunity law and the degree of detail cannot provide an adequate basis for codifying the rules of immunity law. Many of the proposed procedural safeguards do not contribute to the rules for determining whether immunity exists and the consequences of the existence or otherwise the absence of immunity. The degree of detail places an unduly heavy burden on forum States, which would have to adapt their national legislation accordingly. In so far as support for procedural safeguards exists in State practice and the accompanying *opinio juris*, those safeguards could be included, albeit without the current degree of detail. This means that the draft articles need to be streamlined.

Draft article 1

The Kingdom would prefer a more comprehensive approach to the immunity of State officials than that now envisaged by the ILC. For example, the draft articles should also provide for rules on the inviolability of State officials and the prohibition on executing a judgment or any other measure of execution in respect of State officials (immunity from execution).

As regards the conflict clause in draft article 1, paragraph 3, concerning the relationship between the draft articles and the rights and obligations of States in relation to international criminal courts and tribunals, the Kingdom would prefer this clause to be deleted. The rights and obligations of States concerning international criminal tribunals, including whether or not immunity should be granted under a statute or founding treaty of an international criminal tribunal, is a matter for the contracting parties. Whether or not State officials are granted immunity in the interstate settlement

of disputes has nothing to do with procedural conditions such as those proposed in the draft articles. If it is nevertheless to be retained, this aspect of the clause should be clarified.

Draft article 2

The Kingdom considers that the draft articles should better reflect State practice and *opinio juris*, and has also stressed this in its responses to the various ILC reports to the UN General Assembly on this topic. There is a trend towards recognition of exceptions to immunity *ratione materiae* at international and national levels. The Kingdom takes the position that, under international law as it stands, functional immunity does not automatically apply to international crimes.

Draft article 3

The Kingdom agrees with the ILC that the Head of State, Head of Government and Minister for Foreign Affairs are protected by immunity *ratione personae* and also indicates that this interpretation does not prevent other State officials, for example the members of an official mission, from enjoying this far-reaching form of immunity in certain circumstances.

Draft article 4

The Kingdom considers that the scope of the immunity *ratione personae* reflects positive law and that this immunity for the Head of State, Head of Government and Minister for Foreign Affairs extends to all acts, including those that qualify as crimes under international law. This immunity *ratione personae* ends when the term of office of these officials ends. This is also reflected in the Dutch International Crimes Act (*Wet internationale misdrijven*).

Draft article 5

This draft article clearly confirms that all State officials enjoy functional immunity from prosecution or trial by third States. This remains the case even after their term of office has ended.

Draft article 6

This draft article too is uncontroversial and reflects the law as it stands. However, in order to streamline the draft articles, confirmation that functional immunity continues after cessation of the personal immunity of the Head of State, Head of Government and Minister for Foreign Affairs as set out in draft article 6, paragraph 3 could better be included in the commentary to this draft article.

Draft article 7

This draft article provides a good starting point for further study by the Kingdom and other UN Member States of the issue of the exception to functional immunity. This is not yet fully crystallised in Dutch legal practice and it is noted that the final decision on the exercise of jurisdiction is a matter for the courts. In respect of this issue, the ILC could consider the possibility of the limitation of functional immunity being based on the factors of individual criminal responsibility and universal jurisdiction.

The Kingdom has previously expressed the view in the UN General Assembly that an exhaustive list of crimes should not be included, because that would exclude important crimes and hinder the development of the concept of crimes under international law to which immunity would not apply. This results in a preference for a general reference to 'crimes under international law' to which immunity *ratione materiae* does not apply. A general reference would leave scope for the concept of 'crimes under international law' to be interpreted in the light of customary international law and the development of international criminal law. Examples could be included in the commentary to the draft article, provided it is clear that they are intended as illustrations and not as an exhaustive list. The commentary could then examine in more detail the possible applicability of functional immunity to corruption-related crimes and to territorial crimes committed without the forum State having given consent to enter its territory or to perform within its territory the sovereign activity in the context of which the crime was committed.

Draft article 8

The Kingdom is of the view that the wording of draft article 8 should be further delimited. It should be made clear in this draft article that the procedural rules and safeguards in Part Four of the draft

articles do not apply when a current or former State official who enjoys functional immunity is suspected of committing a crime in a private capacity. As it stands, draft article 8 gives the impression that Part Four applies to all exercises of jurisdiction over crimes committed by foreign State officials, current and former.

Draft article 9

In respect of this draft article, the Kingdom would make the following observations. First, a clearer distinction should be made between the question of what constitutes the exercise of jurisdiction and the question of when immunities should be considered. The work of the ILC is solely concerned with the exercise of criminal jurisdiction. This excludes the exercise of other forms of jurisdiction, such as administrative jurisdiction, but does include the activities of other criminal justice authorities, such as public prosecutors and the police. These authorities may be confronted by the issue of whether immunity is applicable, as this can arise at any stage of an investigation, indictment and prosecution. Their analysis of this issue may result in a case not going to trial. It follows that the acts of all these different authorities constitute an exercise of jurisdiction. Within the Dutch legal system, the courts are obliged to review the issue of immunity *ex proprio motu* and the Kingdom does not ask a foreign state to claim immunity in order for immunity to apply. Ultimately this a matter for the courts to decide. Nonetheless, questions concerning whether someone qualifies as a State official, whether the act complained of was performed in the official capacity of the person concerned and, in particular, who should determine this, are very hard to answer. Second, the Kingdom endorses the importance of distinguishing between immunity and inviolability. The Kingdom considers that a person who is entitled to immunity *ratione materiae* does not enjoy inviolability. After all, immunity applies to the functioning of a State official and the question of whether the acts of this official are subject to criminal jurisdiction. The immunity does not apply to the person as such.

Draft article 10

The Kingdom is not in favour of including a notification obligation in the draft articles, since there is no such obligation for the forum State and no basis for providing a description of the procedure to be followed or details to be provided in the event that criminal proceedings are initiated or coercive measures are taken that may affect an official of another State.

Draft article 11

It would be helpful if the ILC were to provide explicitly in the commentary to draft article 11 that the forum State is obliged to examine *proprio motu* the issue of immunity. However, it is not desirable to impose requirements regarding the invocation of immunity, and the *ex proprio motu* examination of the issue of immunity should take place at the earliest possible stage.

Draft article 12

The Kingdom has reservations about adopting as a strict rule the principle that a waiver of immunity is irrevocable. Such a waiver could be revocable in very exceptional circumstances, such as a situation where the right to a fair trial is no longer guaranteed in the State seeking to exercise its criminal jurisdiction over the State official. In addition, the commentary to this draft article should include consideration of the distinction between immunity from jurisdiction and immunity from execution.

Draft article 13

The Kingdom would observe that it is not in favour of a draft article of this kind, which describes a possibility and also suggests that the forum State would be obliged to obtain information from the State of the official. In view of streamlining the draft articles, this draft article could be deleted.

Draft article 14

In respect of draft article 14, the Kingdom would note that a court need not blindly rely on an invocation of immunity by a foreign State official. The court may conclude that the invocation of immunity by a foreign State official is unjustified and/or an abuse of law. Ultimately, it is a matter of trust: an invocation of immunity made in good faith must be taken seriously and accorded

sufficient weight. At the same time, criminal proceedings instituted in good faith against a foreign State official should not be obstructed and dismissed as politically motivated without good reason.

Draft article 15

The Kingdom would prefer this draft article to be deleted. Draft article 15 encourages States to adopt the procedure set out in the draft article when transferring criminal proceedings from the forum State to the State of the official. Both the consideration of whether criminal proceedings should be transferred and the procedure to be followed should be assessed on a case-by-case basis taking into account the international obligations of the States involved.

Draft article 16

The Kingdom notes that the procedural rights of the suspect as contained in this draft article are separate from the issue of immunity and are out of place in the context of this topic.

Draft article 17

The Kingdom would prefer the deletion of this draft article. States are under no obligation to consult each other, but are naturally obliged to respect the immunity of officials of the other State. Moreover, this draft article is hard to reconcile with draft article 18.

Draft article 18

If the draft articles result in a treaty text, the Kingdom, in keeping with current policy, will work to ensure the inclusion of a clause providing for binding dispute resolution.

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