

## **Government response to advisory report no. 43 of the Advisory Committee on Issues of Public International Law (CAVV) on the draft articles of the International Law Commission on immunity of State officials from foreign criminal jurisdiction**

### **Introduction**

On 30 June 2023, the Advisory Committee on Issues of Public International Law (CAVV) adopted the advisory report on the draft articles of the International Law Commission (ILC) of the United Nations (UN) on immunity of State officials from foreign criminal jurisdiction. During its 59th session (in 2007), the ILC decided to include in its programme of work the topic of immunity of State officials from foreign criminal jurisdiction. The ILC adopted the draft articles along with the commentaries on first reading during its 73rd session (in 2022). The ILC requested the States Members to submit their written comments before 1 December 2023. On 7 November 2022, the Minister of Foreign Affairs requested the CAVV to prepare an advisory report.

### **Comments**

In commenting on the CAVV's advisory report, the government will adhere to the structure of the report and examine on an article-by-article basis the CAVV's comments on the draft articles and related commentaries, as well as its suggestions for amending or supplementing them. The government's response is also aligned with its yet to be published response to the CAVV's advisory report on 'Challenges in prosecuting the crime of aggression: jurisdiction and immunities'.

#### *The draft articles in context*

The willingness to prosecute international crimes before national courts on the basis of universal jurisdiction has increased over the years, thereby raising the question of whether personal or functional immunity of foreign State officials would prevent the exercise of criminal jurisdiction over these crimes. The International Court of Justice has confirmed that personal immunity does indeed prevent the exercise of criminal jurisdiction by another State.<sup>1</sup> The controversy about functional immunity has continued to exist. This was possibly the reason why the ILC included the topic in its programme of work. It has subsequently caused considerable debate within the ILC. The CAVV notes that the ILC is deeply divided on the topic, and that States have taken a critical stance towards the proposed draft articles and rejected parts of them. These divisions relate, among other things, to the question of whether

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<sup>1</sup> International Court of Justice (ICJ), 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, paragraph 58.

various draft articles set out positive law or a desirable direction for development of the law. 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. Although some of these procedural aspects can be given consideration, this should, within the scope of the current topic, only be in general terms and not in detail, as this would otherwise not be in keeping with the way in which States interpret the rules of immunity in the context of their national practice. The CAVV therefore considers that thorough editing of the draft articles and the commentary would be desirable in order to provide unambiguous answers to these questions.

The government comes to a similar conclusion and believes that this topic requires a careful approach that does justice to the differing views of States.

The government 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 CAVV also notes that the procedural provisions proposed by the ILC are often not based on existing State practice. The draft articles can therefore be seen as a progressive development of international law, although 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. This may perhaps also explain why there is currently no consensus on the draft articles within the ILC. Those who advocate protecting the interests of the State of the official continue to press for additional safeguards and higher thresholds for the exercise of jurisdiction by the forum State. At the same time, those in favour of protecting the interests of the forum State point out that such safeguards and thresholds will make it impossible in practice for the forum State to exercise its jurisdiction at any time. An emphasis on procedural safeguards (draft articles 8-16) does not help to resolve this underlying difference of opinion, as such an approach does not sufficiently address States' objections in principle to an exception to functional immunity for crimes under international law. After all, a balance struck between these two points of view would have no effect on immunity and would be purely procedural.

The CAVV notes 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 and sees

advantages in working towards draft articles that can ultimately be presented to the UN General Assembly as a draft treaty. The government 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 government 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. In the government's opinion, this means that the draft articles need to be streamlined.

### *Introduction*

#### Draft article 1

The CAVV indicates that it 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 their immunity from execution. The government shares that preference.

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 CAVV indicates that the wording of the clause and the accompanying commentary could cause confusion. To clarify matters, the CAVV suggests making it clear that the conflict clause of draft article 1, paragraph 3 relates only to the exercise of national criminal jurisdiction in the context of proceedings before an international criminal court and amending the commentary accordingly. The government would prefer this clause to be deleted, mainly because the rights and obligations of States concerning international criminal tribunals is not a matter for the ILC. 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 deletion proves impossible, this aspect of the clause should in any event be clarified.

#### Draft article 2

The CAVV believes that the definition in draft article 2 (a) may possibly result in the scope of the provision being too wide, as it extends functional immunity to situations that do not come within the normative scope of the State immunity rule. Although the CAVV considers that it would be desirable to have a definition of State official and the terms 'immunity *ratione materiae*' and 'immunity *ratione personae*', the government would observe that certain definitions can also be dependent on the facts of a specific case. The definitions should therefore have a degree of flexibility. The CAVV believes that the draft articles would also benefit from a clear explanation of the different conceptual approaches to the State immunity rule. The government 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. The government shares the CAVV's view that the approach to functional immunity as an independent rule of international law is in keeping with State practice. There is a trend towards recognition of exceptions to immunity *ratione materiae* at international and national levels. As also indicated in its response to the CAVV's advisory report on the crime of aggression, the government takes the position that, under international law as it stands, functional immunity does not automatically apply to international crimes.

#### *Immunity ratione personae*

#### Draft article 3

The CAVV states that it 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. This is also the government's view.

#### Draft article 4

The CAVV 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. The government agrees with the CAVV on these points as well. This is also reflected in the International Crimes Act (*Wet internationale misdrijven*).

#### *Immunity ratione materiae*

#### Draft article 5

There is little to comment on in this draft article, as it 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. However, this is not the same as impunity, as the immunity of these officials does not apply in their own country. They may be prosecuted and tried in their country of origin, for example for government actions that have no basis in national legislation.

#### Draft article 6

This draft article too is uncontroversial and reflects the law as it stands. The CAVV believes that paragraph 3 is superfluous and that confirmation that functional immunity continues after cessation of the personal immunity of the Head of State, Head of Government and Minister for Foreign Affairs could better be included in the commentary to this draft article. The government is in favour of streamlining the draft articles and therefore agrees with this suggestion.

#### Draft article 7

The CAVV considers that in this draft article the ILC, by presenting the exception to functional immunity as a desirable direction for development of the law, fails to do justice to the State practice regarding the prosecution of crimes under international law committed by foreign State officials. The CAVV regards the exception to functional immunity as a rule that needs further delimitation. In its view, the argument that functional immunity does not apply to crimes under international law for which individual criminal responsibility and universal jurisdiction are accepted under customary international law is legally convincing.

In the government's opinion, this reasoning can be regarded as understandable, and draft article 7 provides a good starting point for further study by the government and other UN Member States. It should however be noted in this connection that the final decision on the exercise of jurisdiction is a matter for the courts and that this is not yet fully crystallised in Dutch legal practice.

The CAVV notes that there is resistance from a considerable number of States to certain applications of the exception to functional immunity and indicates that a solution may possibly be found by making the normative basis for the exception to functional immunities more explicit and including sufficiently strong procedural safeguards. Examination of the substantive aspects of immunity *ratione materiae* in combination with the procedural aspects, including the normative basis, is something which the ILC could consider including in the commentary to this draft article.

In view of the CAVV's observation that other treaties that codify international immunity rules contain hardly any procedural rules, the government would confirm in this response that working towards the adoption of a treaty text on the immunity of State officials from foreign criminal jurisdiction is, in principle, a good idea. Such a treaty would be an effective addition to the existing treaties containing immunity rules, such as the United Nations Convention on Jurisdictional Immunities of States and Their Property. However, the government is not in favour of including extensive and detailed procedural rules in such a treaty and is not, as the ILC seems to be, searching for new rules that have no basis in State practice.

The CAVV agrees with the view previously expressed by the Netherlands 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. The CAVV and the government therefore have a shared preference for a general reference to 'crimes under international law' to which immunity *ratione materiae* does not apply. The possibility of the limitation of functional immunity being based on the factors of individual criminal responsibility and universal jurisdiction, as suggested by the CAVV, is something which the government will ask the ILC to consider. 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. This is in keeping with the CAVV's suggestion.

#### *Procedural aspects and safeguards*

##### Draft article 8

The CAVV considers that 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. The government agrees with the CAVV's suggestion that the wording of draft article 8 be further delimited.

#### Draft article 9

The CAVV makes a good many observations about this draft article. First, the discussion of the expressions 'criminal jurisdiction' and 'criminal proceedings' in the commentary raises questions. Second, the CAVV considers it would be preferable to treat only the constraining nature of the act of the forum State that affects the State official as decisive for the question of whether immunity prevents the performance of the act. Third, the CAVV suggests that the examination and determination of immunity (which are currently dealt with separately in draft articles 9 and 14) should be treated as a continuous process and regulated in a single draft article. Finally, the CAVV indicates that consideration must be given to the inviolability of foreign State officials, given, for example, that this entails further procedural restrictions.

In response, the government 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 Netherlands 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 government endorses the importance of distinguishing between immunity and inviolability. The government 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.

Where a foreign summons is issued for a person who enjoys immunity *ratione personae*, the Netherlands will lodge an objection. The government considers that the inviolability and immunity of, say, a Head of State are incompatible with a foreign summons. On the other hand, the Netherlands will, in principle, not object

to a non-binding invitation to testify addressed to a person who enjoys immunity. Nonetheless, such a request will in all likelihood not be complied with.

#### Draft article 10

In the CAVV's opinion, there is no notification obligation in relation to mandatory measures that are necessary in order to ensure that any future criminal proceedings can take place and this exception – as provided for in draft article 14 – should also be included in draft articles 9 and 10. The government can follow this reasoning, but at the same time it is not at all in favour of including a notification obligation in the draft articles.

#### Draft article 11

The CAVV considers that it would be a good thing 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. The government agrees with this and would stress that the *ex proprio motu* examination of the issue of immunity should take place at the earliest possible stage.

#### Draft article 12

The CAVV has reservations about adopting as a strict rule the principle that waiver of immunity is irrevocable. Such a waiver must be revocable in very exceptional circumstances. The CAVV also observes that the commentary to this draft article should include consideration of the distinction between immunity from jurisdiction and immunity from execution. The government agrees with both points.

#### Draft article 13

In the CAVV's opinion, there is no need for a separate draft article providing that the forum State may request information from the State of the official. This could be dealt with in the commentary to draft article 14. The government would also 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. Moreover, as noted previously, the government is generally in favour of streamlining the draft articles and for that reason too would have no objection to the deletion of this draft article.

#### Draft article 14

The CAVV considers that this draft article fails to provide sufficient clarification of how the taking of coercive measures in connection with criminal proceedings relates to personal immunity and the accompanying inviolability. But the CAVV notes that, in the case of functional immunity as well, the continuance of coercive measures



after it has been determined that immunity is applicable seems very far-reaching. The draft article also seems to fail to properly weigh the interests of the foreign State against those of victims of alleged crimes. The CAVV states that these points should be addressed and also suggests that a link should be established with draft article 7 and the question of whether the exception to immunity for crimes under international law should not be made conditional on the existence of substantial indications that the international community defines the acts to be prosecuted as crimes under international law. The CAVV also recommends considering the inclusion of a rule assigning primary jurisdiction to the State of the official in respect of crimes under international law, in combination with robust procedural safeguards. In response to the CAVV's comments on this draft article, the government would note that the suggestions are very detailed and are not necessary for any codification of the rules on immunity of State officials from foreign criminal jurisdiction. The government would stress 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

Although the CAVV does not have any comments on this draft article, the government would prefer it to be deleted. The draft article 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.

#### Draft article 16

The CAVV 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. The government fully agrees with the CAVV.

#### Draft article 17

The CAVV points out that the ILC presents the consultations to be held by the forum State and the State of the official as an obligation, but does not make any suggestions for additions or improvements to the draft article. The government, on the other hand, considers this draft article to be problematic because it is conceptually flawed. 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. The government would therefore prefer to have this draft article deleted.

#### Draft article 18

The CAVV observes that the provision on a binding dispute resolution mechanism proposed by the ILC does not contain an opt-out clause for States, but notes that it is explained in the commentary that States can make a reservation to this draft article. If the draft articles result in a treaty text, the government, in keeping with current policy, will work to ensure the inclusion of a clause providing for binding dispute resolution.

#### **Conclusion**

The government is grateful to the CAVV for its detailed advisory report, which it will take into account when drawing up its written comments on the draft articles and the commentaries to the articles. The government will arrange for the CAVV's advisory report, together with the government's written comments, to be translated so that they can be brought to the attention of the ILC.