

Letter of 26 April 2012 from the Minister of Foreign Affairs and the State Secretary for Security and Justice to the Senate and the House of Representatives on the immunity of members of foreign official missions

-unofficial translation of the merits-

1. General

This letter is a follow-up to the government response to advisory report no. 20 of the Advisory Committee on Issues of Public International Law (CAVV) on the immunity of foreign state officials.¹ This response received broad support from the House's Permanent Committee on Foreign Affairs at its meeting of 8 November 2011 with members of the government on advice on international law.²

The CAVV takes the view that under customary international law all members of foreign official missions visiting the Netherlands enjoy immunity. The CAVV's advisory report recommends that policy be formulated on this matter, to establish the conditions on which members of official missions may claim immunity from Dutch jurisdiction while on a visit to the Netherlands. This letter indicates how the government will give effect to this recommendation.

2. Legal framework

The government wishes to emphasise that promoting the development of the international legal order is an important element of Dutch foreign policy, which also encourages respect for human rights and the prosecution of those suspected of international crimes. Dutch foreign policy also attaches importance to other areas of international law which are essential to the proper functioning of the international legal order, including the rules on immunities.

The International Crimes Act (WIM) establishes Dutch jurisdiction over serious international crimes such as genocide, crimes against humanity and war crimes. However, section 16 of the Act contains an exception for people who enjoy immunity under international law. It reads as follows:

¹ House of Representatives, 2011-2012 session, 33000 V, no. 9.

² House of Representatives, 2011-2012 session, 32635, no. 4.

‘Criminal prosecution for one of the crimes referred to in this Act is excluded with respect to:

- (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 international law;
- (b) persons who have immunity under any convention applicable to the Netherlands within the Kingdom.’

As stated in the government’s response to the CAVV’s advisory report, the government agrees with the CAVV that section 16 of the International Crimes Act adequately reflects the current state of international law and can continue to function as a good guiding principle. Section 16 (a) concerns persons whose claim to immunity is based on customary international law, i.e. primarily foreign heads of state, heads of government and ministers of foreign affairs; they enjoy personal immunity while in office. Section 16 (a) also extends to ‘other persons insofar as their immunity is recognised under international law’. The government agrees with the CAVV that under customary international law members of official missions enjoy immunity. This applies both to members of foreign official missions visiting the Netherlands and to members of Dutch official missions visiting other countries. Members of official missions can be regarded as ‘temporary diplomats’. Like diplomats, they need immunity to be able to perform their duties on behalf of the sending state without interference. Unlike in the case of diplomats, however, this immunity is required for a brief period only, namely for the duration of the visit to the receiving state. The Netherlands is obliged under customary international law to guarantee immunity to members of official missions. They are covered by the category defined in section 16 (a) of the International Crimes Act: ‘other persons insofar as their immunity is recognised under international law’.

3. What is an official mission?

In answering this question, the obvious course would be to refer to the definition given in the Convention on Special Missions, which was adopted by the UN General Assembly on 8 December 1969 and entered into force on 21 June 1985. It was modelled on the Vienna Convention on Diplomatic Relations of 1961. Relatively few states (38) are party to the

Convention on Special Missions; the Netherlands is not one of them.³ Article 1 (a) of the Convention defines a special mission as follows: ‘a “special mission” is a temporary mission, representing the state, which is sent by one state to another state with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task’. Like the CAVV, the government uses the term ‘official mission’, which it takes to mean not only missions with a specific purpose (relating to a specific policy area, such as energy or cultural affairs) but also visits of a more general nature which relate to various parts of government policy. Examples could be missions led by foreign prime ministers or ministers of foreign affairs.

To comply with this definition, an official mission must fulfil four conditions. If it does so, it is legally speaking an official mission. There is no requirement for the receiving state to give an explicit decision designating a foreign delegation as an official mission. It is up to that state’s ministry of foreign affairs to confirm as appropriate that a mission is an official mission.

a. Temporary nature

An official mission is temporary in nature. This distinguishes it from a permanent diplomatic mission (an embassy), which is defined in article 1 (b) of the Convention on Special Missions as ‘a diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations’. Official missions will generally remain in the Netherlands for a relatively short time, ranging from part of a day to a period of several weeks.

b. Representing a state

An official mission is a mission from one state to another. However, this does not mean that all the members of an official mission must be government officials. They may include, for example, parliamentarians or representatives of the business community.

c. To another state

³ See also the CAVV’s advisory report, p. 32.

An official mission must be a mission to the government of the receiving state. A delegation from another state that comes to the Netherlands solely for a major sporting event or to visit one or more companies is thus not an official mission.

d. Consent of the receiving state

The receiving state must have consented to receive the mission in question. Without such consent, a mission cannot be described as official and its members have no claim to immunity. Consent may be demonstrated by an official invitation and an agreed programme or agenda for the mission's visit. It is not enough for an individual on a visit to be in possession of a visa (for countries where a visa is required). A visa application need not indicate that the person concerned plans to visit the country in question in the context of an official mission. The issue of a visa does not therefore constitute consent to an official mission.⁴

4. Extent of the immunity enjoyed by members of official missions

The immunity enjoyed by people who act on behalf of states takes two forms: *personal* immunity and *functional* immunity. Functional immunity concerns acts performed by state officials in their official capacity. Personal immunity is not limited to these acts and also extends to private acts.

As the CAVV stated, foreign heads of state and government and ministers of foreign affairs enjoy personal immunity while they are in office. The same applies to diplomats and members of official missions. This means, for example, that they cannot be prosecuted in the Netherlands for any offences of which they are suspected. As soon as persons in the above categories cease to hold office, they enjoy only functional immunity; in other words immunity for acts performed in their official capacity and not for private acts.

5. How does this relate to obligations to the International Criminal Court?

⁴ Cf. in this connection the judgment of an English court in a case concerning whether a visit by the head of the security service of Mongolia should be regarded as an official mission, with the result that he could not be extradited to Germany. The English court concluded that the visit was not an official mission since consent had not been given by the receiving state (judgment of 29 July 2011, [2011] EWHC 2029 (Admin)).

In this connection the government would observe that in certain cases immunity from prosecution by the Dutch criminal courts need not obstruct the surrender by the Dutch authorities of the person concerned to the International Criminal Court (ICC) in accordance with article 98 of the Rome Statute. As the government stated in the explanatory memorandum to the bill for the approval of the Statute of the International Criminal Court (a point which was developed in the explanatory memorandum to the International Crimes Act), a state party to the Statute is under a general obligation to cooperate fully with the ICC and to surrender persons requested by the Court (see article 86 of the Statute). As regards the position of nationals of a third state a distinction must be made between third states which are party to the Statute and third states which are not.

If the third state is party to the Statute, it too is bound by article 27 and subject to the obligation to cooperate embodied in article 86. Accordingly, such a state accepts that its nationals cannot claim immunity in respect of crimes over which the ICC can exercise jurisdiction under article 5 of the Statute. However, if the third state is not party to the Statute, it is obviously – leaving aside the exception provided for in article 12, paragraph 3 – not bound by the obligation to cooperate with the Court. In such situations, it is therefore possible that a requested state would breach its obligations under international law if it surrendered to the ICC a person claiming immunity without first having waived such immunity. That the case may involve criminal responsibility for universally recognised crimes makes no difference. Under article 98, paragraph 1 of the Statute, it is then primarily up to the ICC to form an opinion and assess whether it can continue its request to the requested state.

6. Conclusion

In addition to the above, relating to section 16 of the International Crimes Act, the CAVV also proposed amending section 3.1.1 of the Disposal of Criminal Complaints (Offences under the International Crimes Act) Instructions (see p. 41 of the advisory report). As the government indicated in its response, it has adopted this recommendation and the Instructions have now been amended accordingly.⁵ This makes it clear that members of official missions enjoy immunity under customary international law.

⁵ Government Gazette, no. 22803, 20 December 2011.

In accordance with the CAVV's recommendation, a copy of this letter will be sent to the judiciary for information purposes.