

Government response to CAVV Advisory report No. 20 on the immunity of foreign state officials

- unofficial translation of the merits -

Main points of the advisory report

As the CAVV states in the report, the interest the international community has in the punishment of international crimes must be balanced against the interest that states have, as one another's equals, are not allowed to try one another. Such a trial – or simply the possibility of such a trial – could, after all, destabilise international relations. State immunity and its corollary – the immunity of persons who act on behalf of states – prevents foreign states from exercising jurisdiction and can therefore also be seen as an instrument for maintaining international stability. The CAVV's advisory report examines choices, conclusions and recommendations regarding this dilemma, against the background of an area of international law that is very much in flux.

The immunity of persons who act on behalf of states takes two different forms, namely personal immunity and functional immunity. Functional immunity is limited to the acts of state officials in their official capacity. Personal immunity is not limited to these acts and also extends to private acts.

The CAVV notes that there is a marked trend towards a situation in which the prosecution of international crimes takes precedence over functional immunity. It reached this conclusion after consulting literature, court judgments and conventions that make international crimes punishable, namely the UN Convention on Genocide (1948), the Geneva Conventions (1949), the UN Convention against Torture (1984) and the Convention for the Protection of All Persons from Enforced Disappearance (2006). The CAVV opts for an approach in which individuals, even if they are state officials using state resources, are personally responsible for international crimes. It adds that, though there is a strong development in this direction, it has not yet fully crystallised. By adopting this approach, the Dutch authorities might be able to help shape customary international law which is, after all, dependent on state practice. In this scenario, balancing the importance of ensuring the smooth conduct of international relations against the importance of combating impunity would tip in favour of the latter.

The CAVV notes that this approach would not be permissible when personal immunity is invoked by those who are entitled to it. After all, the view that personal immunity is absolute is widely supported in international law (and by the CAVV), as good relations between states and international stability take precedence over punishing international crimes. Accordingly, acts which might undermine the freedom and dignity of state representatives must be prevented.

The best-known group of state officials to enjoy personal immunity under international law are incumbent heads of state, heads of government and ministers of foreign affairs. Their personal immunity is by virtue of their official capacity, and is as such of limited duration. Once they have left office they are only entitled to functional immunity and what was said above concerning functional immunity will also apply to them.

Diplomats and other individuals to whom the Vienna Convention on Diplomatic Relations applies, as well as representatives of the member states of international organisations, enjoy personal immunity under the relevant conventions as long as they are in office or for the duration of their visit to an international organisation in the Netherlands.

The request for advice asks whether other foreign state officials enjoy the same immunity as heads of state, head of government and ministers of foreign affairs. The CAVV responds that this is not the case, as there are insufficient precedents for extending personal immunity and that, moreover, this would not fit with the trend for punishing international crimes to take precedence over immunity.

The CAVV does, however, observe that representatives of other states are entitled to personal immunity under customary international law during *official missions*. In this case immunity is not linked to office – as is the case for heads of state, heads of government and foreign ministers – but to the duration of a visit. The minimum conditions for such immunity are that the mission must have originated from another state, and that the Dutch government has consented to the mission in some way and has been informed of its composition. Members of official missions do not have to be state officials.

In the CAVV's opinion it would be sufficient for customary international law to be incorporated into policy on this area, and it recommends that this be done. Another option would be to draw up legislation that, if considered politically desirable, could be extended to persons who do not fall under customary international law but who in the interests of international relations – and of course within the bounds of international law – should be granted personal immunity so as to prevent legal proceedings against them.

Chapter 5 of the advisory report looks at this in greater detail in the form of three questions and answers.

Government response

The government agrees with the report's main conclusions and recommendations. In this response we therefore focus on how the government can do the most justice to the developments the report notes in international law. The priority is ascertaining where, in practice, there is scope for international crimes to be tried, and in which cases obligations regarding immunity should be observed.

The government believes that the rule on immunity set out in section 16 of the International Crimes Act can continue to function as a good guiding principle. Section 16 reads as follows:

'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.'

The government agrees with the CAVV that section 16 of the International Crimes Act adequately reflects the current state of international law. Section 16 (a) concerns immunity based on customary international law. Section 16 (b) refers to immunity based on conventions. In this connection, where there are grounds for functional immunity on the basis of conventions it can be assumed that this immunity will not extend to international crimes committed by the persons in question in the course of their duties.

Section 16 (a) concerns claims to immunity based on customary international law. This applies primarily to foreign heads of state, heads of government and ministers of foreign affairs. They enjoy personal immunity throughout their period of office. There is insufficient reason to extend these three categories to include, for example, other ministers in office. Once these three

categories of representatives have left office, they are only entitled to functional immunity; in other words, they will have immunity only for acts performed in their official capacity, not for private acts. In line with the development outlined by the CAVV, the government agrees that these three categories of representatives should not be able to invoke immunity once their period in office has ended if they are suspected of having committed international crimes while in office. Accordingly, the functional immunity those concerned continue to enjoy once their period in office has ended will most likely not prevent a Dutch criminal court from exercising its jurisdiction, if there is reason to believe that international crimes have been committed. The final judgment lies with the court.

The rule set out in section 16 (a) is not limited to the three categories of representatives specified, but extends to 'other persons insofar as their immunity is recognised under international law'. In the CAVV's opinion, all members of official missions may be entitled to full immunity under customary international law. The government endorses this. Members of official missions can be seen as 'temporary diplomats'. They, like diplomats, require this immunity so they can carry out their mission for the sending state without interference. However, unlike diplomats, members of official missions only require this immunity for a short period, namely the duration of the mission to the receiving state.

The CAVV mentions two ways in which it can be made explicitly clear that members of official missions are entitled to personal immunity. The first option would be to formalise it in a letter to the States General, with notification to the judiciary. The letter would set out the conditions that would need to be met (e.g. the approval of the Dutch government, and the object and duration of the mission). The second option would be to amend section 16 of the International Crimes Act, to refer explicitly to the immunity of members of official missions.

The government is of the opinion that it would be preferable to clarify that all members of official missions are entitled to full immunity in a letter to the States General. Developments within relevant areas of international law have not yet fully crystallised; accordingly, it would be better not to amend section 16 of the International Crimes Act for the time being. The government will therefore draft a letter to the States General in the near future, setting out in greater detail that members of official missions are entitled to full immunity and therefore belong in the category 'other persons insofar as their immunity is recognised under international law' as referred to in section 16 (a) of the International Crimes Act. The letter will also state the conditions that need to be met before official missions can claim immunity.

Conclusion

The government is grateful to the CAVV for this well thought-out and nuanced advisory report. On the one hand, the report does justice to new developments in international law, particularly where they concern the efforts to combat impunity. The government endorses what the CAVV writes about developments in functional immunity, even if it is somewhat more reserved when it comes to options for shaping customary international law on this point. On the other hand, the CAVV shows that under current international law foreign state officials can continue to claim immunity if they are confronted with legal proceedings before a foreign court, demonstrating the importance attached to the smooth conduct of bilateral relations. The carefully substantiated arguments underlying the CAVV advisory report will enable the government to make well-grounded choices regarding an area of international law that is still in flux.