

**ADVISORY COMMITTEE
ON ISSUES OF PUBLIC INTERNATIONAL LAW**

**ADVISORY REPORT
ON THE IMMUNITY OF
FOREIGN STATE OFFICIALS**

(TRANSLATION)

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1. INTRODUCTION

1.1 The dilemma between trial by the national courts and immunity

The Minister of Foreign Affairs has asked the Advisory Committee on Issues of Public International Law (*Commissie van advies inzake volkenrechtelijke vraagstukken*, CAVV) to produce an advisory report on the relationship between the trial of international crimes in the Netherlands and the obstacle posed by the immunity of foreign state officials.² The request concerns an area of international law that is presently very much in flux, as the CAVV came to realise even more while preparing this advisory report.

In his request for advice the Minister formulates the issue on which advice is sought as follows:

‘Questions about the exercise of criminal jurisdiction by the Netherlands in relation to foreign state officials are becoming increasingly common in practice. This is partly because of the efforts to combat impunity for serious international crimes. Although immunity need not result in impunity, immunity (often temporary) limits the scope for the criminal prosecution of foreign officials by the Netherlands.’

International crimes are crimes that threaten the peace, security and wellbeing of humanity and for this reason may not, in the opinion of the international community, go unpunished. Examples are genocide, crimes against humanity (including torture and enforced disappearance) and serious war crimes.

The immunity from jurisdiction which the Minister mentions as a possible constraint on the prosecution of these crimes is an important instrument of international law in the application of the principle that a state may not be subjected to the jurisdiction of another state. The basis of this principle is that states are one another’s equals and that equals cannot try one another. As states function through the actions of people, persons acting for states also enjoy immunity. The importance of the division of jurisdiction between states and the role of state immunity in this division are dealt with in section 2.1. Section 2.2 discusses the different forms which the immunity of state representatives can take: i.e. personal 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.

The distinction between these two forms of immunity is of great importance as there is widespread support in international law for the view that personal immunity is, in principle, absolute. For the smooth conduct of international relations, it is

considered essential for certain persons to be exempted, by virtue of their office or the acts they perform on behalf of their state, from acts by another state that may jeopardise these relations. For example, heads of state and heads of government as well as diplomats enjoy personal immunity.

Against the background of the matters discussed in chapter 2, chapter 3 examines how the different interests are balanced: on the one hand, the trial of international crimes by the courts of foreign states and, on the other, the possibility of claiming immunity from prosecution in such proceedings. After certain introductory comments in section 3.1, section 3.2 expounds the proposition that personal immunity is, in principle, absolute. Section 3.3 deals with the scope of personal immunity under procedural law.

In the area of functional immunity, the importance of combating impunity is gaining ground on the principle that states should not try one another's representatives. Some current approaches to this development are discussed in section 3.4 by reference to court judgments and the specific international law rules that have developed on the basis of treaties that make international crimes punishable. The growing prevalence of trial by international criminal tribunals is also evidence of an international trend to banish impunity. Although the request for advice does not concern these tribunals, the CAVV considers it worthwhile discussing the immunity rules of the International Criminal Court. This is done in section 3.5. Section 3.6 contains a summary of chapter 3.

1.2 The dilemma and the International Crimes Act (WIM)

The dilemma described by the Minister in his request for advice is also evident in the International Crimes Act (*Wet internationale misdrijven*, WIM).³ The introduction of this legislation was prompted by the Netherlands' becoming party to the Rome Statute of the International Criminal Court (ICC).⁴ The Statute is based on the principle that where both national courts and the ICC are entitled to exercise jurisdiction, national courts should have precedence. The International Crimes Act creates Dutch jurisdiction for crimes that are made punishable in the Rome Statute. However, section 16 of the Act contains an exception for people who enjoy immunity under international law. Section 16 of the International Crimes Act 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.’

Chapter 4 discusses section 16 of the International Crimes Act. This chapter also provides an answer to two questions raised by the Minister. These are:

‘What is the scope of the immunity from criminal jurisdiction of foreign heads of state, heads of government and ministers of foreign affairs under international law?’

and

‘Are there other foreign state officials, besides heads of state, heads of government and ministers of foreign affairs, who enjoy immunity from (criminal) jurisdiction? Is it possible to formulate criteria to this end? What would be the scope of this immunity?’

1.3 Immunity from civil jurisdiction

The last question in the request for advice is:

‘Do these persons also enjoy immunity from administrative and civil jurisdiction?’

As emphasised in this introduction and as will become apparent in the remainder of this advisory report, international law is very much in flux as regards the relationship between immunity and combating impunity for international crimes. The literature on this subject tends to put the emphasis on the criminal law. However, it is striking that the literature often refers to civil judgments of national courts. As the two subjects are so interwoven, the CAVV has decided not to devote a separate chapter to the civil immunity of state representatives, but instead to deal with it as an integral part of the argument. Particular attention should be paid in this connection to what is said in section 3.3.

The CAVV considers it is highly improbable that redress for international crimes would be sought before a national administrative court. It will therefore disregard this aspect of question 3.

Chapter 5 contains the answers to the questions. The findings on immunity from civil jurisdiction are summarised in the answer to question 3.

1.4 Sources of law

In view of the evolving nature of the relationship between international crimes and immunity from jurisdiction, each part of the advisory report must be carefully argued.

Conventions, customary international law, national and international case law and the teachings of authoritative publicists are regarded as important sources of law.

International conventions have been concluded both on combating international crimes and on immunity from jurisdiction. Examples of conventions concerning international crimes are the UN Convention on the Prevention and Punishment of the Crime of Genocide, the UN Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance. The Geneva Red Cross Conventions also concern international crimes.⁵ The Vienna Conventions on Diplomatic Relations and Consular Relations concern the rights and obligations of diplomatic and consular representations of states and their staff in the territory of other states, and the Convention on Special Missions regulates the immunity of such missions.⁶

However, the immunity of heads of state, heads of government and ministers of foreign affairs is regulated not in international conventions but in customary international law. This law arises as a result of the conduct of states in practice (*usus*) and through the recognition that such custom is accepted as law (*opinio juris*). The existence of a custom and its recognition as law are not always easy to demonstrate and the precise content of customary law cannot always be clearly determined.

Sources of customary law include international conventions. These can confirm existing or evolving customary law.⁷ The views of governments as disclosed from time to time are the most reliable source for the determination of customary international law. However, this is a relatively inaccessible source. Confirmation of these views can be obtained, for example, in national and international case law. However, caution is required in interpreting the judgments of national courts because they must be viewed against the background of the legal system and political climate of the forum state.

Use can also be made of the writings of publicists both as regards the sources of government action and as regards assessment of national and international case law.⁸

2. JURISDICTION AND IMMUNITY

2.1 Jurisdiction and state immunity

International law has evolved against the background of an emerging community of sovereign and territorially delimited states, which are required to treat each other with respect in keeping with the principle of sovereign equality. Within this community of states international law is used primarily as an instrument for defining the boundaries of state authority. This function of international law is still of great importance. This is reflected, for example, in the rules that determine the jurisdiction of states to make national laws and to enforce and adjudicate national and international legal rules. The scope of this jurisdiction is determined primarily territorially,⁹ but can also apply to incidents or acts outside the territory of a state, for example on ships and in aircraft that are registered in that state or to acts of citizens and sometimes even non-citizens outside the territory of the state.¹⁰ International law indicates where the boundaries of a state's jurisdiction lie, thereby ensuring that the exercise of this jurisdiction does not result in an unacceptable infringement of the rights of other states. An important rule on the limitation of the jurisdiction of states is that the acts of a state cannot, in principle, be subjected to the jurisdiction of another state. This is the *maxim par in parem non habet imperium* (equals do not have authority over one another). It follows that state acts are not subject to the criminal, civil and administrative jurisdiction of a national court of another state.

State immunity has evolved over the past century from absolute (no state act whatever can be subject to the jurisdiction of another state) to relative, where the nature of the act itself is relevant. In respect of, for example, purely commercial transactions of a state, it will no longer be assumed that the state is entitled to immunity from the civil jurisdiction of a foreign court.

The international rules on state immunity are based mainly on customary international law. In 2004 the UN adopted the Convention on Jurisdictional Immunities of States and their Property. This convention broadly reflects the principles of customary international law. It has not yet entered into force.¹¹

2.2 Immunity of persons acting on behalf of a state

The corollary of the immunity of the state itself is the immunity of persons who act on behalf of the state. A state can, after all, function only through the acts of individuals.

The immunity of state officials takes two forms: *functional immunity* (immunity *ratione materiae*) and *personal immunity* (immunity *ratione personae*). State officials enjoy functional immunity from the criminal, civil and administrative jurisdiction of a foreign state for acts performed in their official capacity.¹² Persons who act on behalf of a state do so in the name of the state and can therefore not be held legally liable for such acts by a foreign state. Functional immunity is an instrument for passing responsibility for the acts of a state official to the state. If this were not the case, holding state officials liable for their acts on behalf of the state would circumvent the principle of state immunity. The functional immunity of state officials is guaranteed in article 2, paragraph 1 (b) of the Convention on Jurisdictional Immunities of States and their Property.¹³

Personal immunity is not limited to acts performed in the course of official duties, but extends to all acts, including those performed in a private capacity. This constitutes full immunity from the jurisdiction of a foreign state. The terms 'personal' and 'full' immunity are taken to be synonymous in practice. For example, the International Court of Justice ('ICJ') talks of 'full immunity' in the *Arrest Warrant* case (about which more later).¹⁴

Traditionally, personal immunity has been granted to heads of state. This has been undisputed, mainly because heads of state are regarded as the personification of a state. For the sake of the smooth conduct of international relations they must be able to act abroad without interference.¹⁵ More recently, it has been generally recognised that heads of government too enjoy personal immunity for the same reasons. In the *Arrest Warrant* case, this form of immunity was also granted by the International Court of Justice to ministers of foreign affairs. As discussed in section 4.3, the smooth conduct of international relations may also be a reason for granting personal immunity to other representatives of foreign states.

Just as state immunity has ceased to be absolute, so the scope of the immunity of persons acting on behalf of a state is being influenced by current developments. The changing perspective on immunity in the context of combating impunity for

perpetrators of international crimes is the subject of the next chapter, where it will be seen that personal immunity remains intact and that the changing perspective is limited almost entirely to the field of functional immunity.

3. INTERNATIONAL CRIMES AND IMMUNITY

3.1 Balancing the different interests

The reason for the existence of immunity in international law was explained in the previous chapter as being that it is instrumental in delimiting the jurisdiction of states, which is essential for interstate relations. However, although the smooth conduct of these relations is incontestably of great importance, it is coming under increasing pressure from the growing desire to combat the impunity of perpetrators of international crimes. This changing balance is characterised by the remark of former UN Secretary-General Kofi Annan that the establishment of the International Criminal Court is helping to end '*the global culture of impunity*'.¹⁶

3.2 Respecting personal immunity

It is apparent from state practice, national and international case law and the literature that personal immunity in relation to international crimes remains intact. This is mainly due to the belief that, for the sake of the smooth conduct of international relations, certain persons should, in view of their office or the acts they perform on behalf of a state, be protected from acts by another state that would hinder these relations.¹⁷

This belief played a prominent role in the judgment of the International Court of Justice in the *Arrest Warrant* case (2002). This concerned an arrest warrant issued by Belgium in absentia against the Congolese foreign minister for crimes against humanity and genocide. The ICJ held as follows:

*'The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.'*¹⁸

On the basis of state practice, the ICJ also concluded that it had been:

*'unable to deduce [...] that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.'*¹⁹

As the ICJ granted personal immunity to incumbent ministers of foreign affairs these passages can be regarded as confirming the view that personal immunity takes precedence over trial by a foreign state for war crimes or crimes against humanity.

In the *Arrest Warrant* case the ICJ did not consider in more detail the distinction between personal and functional immunity. It thus left open the question whether functional immunity exists in the case of international crimes. Instead, it put the emphasis on the immunity of an incumbent minister of foreign affairs. Nonetheless, the ICJ did hold that:

*'[i]t should further be noted that that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities [...]. Thus, although various international conventions or the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.'*²⁰

Whether there can be immunity for international crimes therefore depends, in the opinion of the ICJ, on the position of customary international law on this subject. This question and the research needed to determine the position of customary international law are relevant since after heads of state or government and ministers of foreign affairs cease to hold office they are entitled only to functional immunity. This is dealt with in section 3.4 below.

A clear position in this debate is taken by the Institute of International Law (*Institut de droit international*, IDI) in its Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State (2009).²¹ Resolutions of the IDI reflect the views of leading international jurists and are regarded as very authoritative. Article III, paragraph 1 of the Resolution provides that:

'[n]o immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.'

The IDI therefore considers that personal immunity exists for international crimes. It also follows from the words 'other than' that the IDI completely rejects the notion that functional immunity exists for international crimes.

The CAVV too recognises that the prevailing doctrine is that respecting personal immunity is a general duty of international law, which should also be honoured in cases concerning international crimes. This conclusion applies to the exercise of any form of jurisdiction by a foreign state vis-à-vis a person having personal immunity, including therefore both criminal and civil jurisdiction.

3.3 Scope of personal immunity under procedural law

In the *Arrest Warrant* case the International Court of Justice held that Belgium had violated the immunity of the Congolese minister of foreign affairs by issuing an international arrest warrant. However, not all criminal procedure measures against a person entitled to immunity are impermissible. This became evident in a case before the International Court of Justice in which a French witness summons had been addressed to the head of state of Djibouti (2008).²² Djibouti argued that this was a breach of the rule of customary international law obliging states to prevent attacks on the person, freedom or dignity of a head of state of another country.²³ France stressed that the head of state was free to decline to attend and that the French judicial authorities had not issued a constraining measure. This last point was taken by the ICJ to be decisive in determining whether the immunity of the head of state has been violated. As the head of state had not been obliged to appear, France had not breached international law. The ICJ, quoting from the *Arrest Warrant* judgment, held that:

'A Head of State enjoys in particular "full immunity from criminal jurisdiction and inviolability" which protects him or her "against any act of authority of another State which would hinder him or her in the performance of his or her duties."

and went on to conclude that:

*'the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subsection of the latter to a constraining act of authority.'*²⁴

Where the question arises of whether criminal procedure measures may be taken against a person entitled to immunity, the CAVV considers that the criterion formulated by the International Court of Justice is serviceable, namely that non-constraining acts do not constitute a violation of the immunity rule for persons entitled to personal immunity.²⁵ After all, if an act does not affect the reason for granting immunity, it does not affect the immunity either.²⁶

The CAVV considers that the criterion formulated by the International Court of Justice can also be used in civil cases. This means that the Dutch courts will have jurisdiction in civil cases in which personal immunity is claimed, provided that the exercise of this jurisdiction does not involve acts that constrain the person concerned in the exercise of his duties or constitute an attack on his dignity as the representative of a foreign state. The borderline between constraining and non-constraining acts is perhaps less easy to draw in civil law than in the law of criminal procedure. Hearing or even granting a claim for damages against a foreign head of

state does not necessarily constitute an act that constrains the person concerned in the performance of his duties. The freedom of movement of the person entitled to personal immunity is not therefore necessarily constrained. The situation is different when a judgment is executed.

The CAVV considers that in civil cases the courts should observe restraint since the criterion applied above for respecting personal immunity, namely that it should be possible for the conduct of state duties to be continued without interference, is not the sole criterion. Personal immunity, as a sign of dignity, is still symbolic of respect for the other state as an equal and is hence relevant to mutual relations. This element cannot be entirely abandoned.²⁷ This is an integral part of state immunity.

The need for the national courts to observe restraint in this respect in the interests of the smooth conduct of international relations was also recognised by a Dutch court in proceedings brought against US President George W. Bush. The court held that:

‘granting one or more of the plaintiffs’ claims [would have] serious implications [...] for relations between the Netherlands and the United States and hence also for Dutch foreign policy.’²⁸

Restraint is also generally observed by courts in other countries. An example in the United Kingdom is the *Jones* case.²⁹ In the United States there is extensive case law on this point. However, a particular feature of American cases on state immunity is that the executive branch may require the courts, by means of what is known as a ‘suggestion of immunity’, to honour a claim for immunity. This is based on a judgment of the United States Supreme Court, in which it reasoned that it:

‘*must be accepted by the courts as a conclusive determination by the political arm of the Government that the retention of jurisdiction by the courts would jeopardize the conduct of foreign relations.*’³⁰

Although the American court that heard the case of *Li Weixum v. Bo Xilai* indicated that it would honour the suggestion of immunity, this did not deter it from giving its own reasons for its lack of jurisdiction:

‘*For the Court to adjudicate this case would contravene a foreign policy decision taken by the Executive, [...] offer the prospect of inconsistent pronouncements in a sensitive foreign relations context and [...] continue to place undesirable stress upon U.S. relations with China.*’³¹

As regards the scope of procedural law the CAVV concludes that the International Court of Justice has formulated a serviceable criterion that can be applied in both criminal and civil cases. The essence of the criterion is that acts are permitted only

if the person entitled to immunity is not thereby hindered in the performance of his duties. The CAVV recommends that when determining the scope of the criterion in specific civil cases the courts should adopt a restrained approach in the interests of mutual relations.

3.4 Impunity versus functional immunity for international crimes: three approaches

This section considers three different approaches that have been adopted to argue the notion that functional immunity should be limited in order to punish the perpetrators of international crimes.

The *first approach* is to argue that the commission of an international crime cannot be regarded as an official state function and that such an act must therefore always be regarded as a private act by the person concerned. As the commission of the crime is not a state function, neither the perpetrator nor the state of which the perpetrator is a national can claim functional immunity.³²

This argument is recognised in national case law on state officials.³³ In 2000, for example, the Amsterdam Court of Appeal held as follows in proceedings brought against Bouterse, the then head of state of Surinam, for the so-called December murders in Surinam:

'[t]he commission of very serious crimes of this kind cannot, after all, be regarded as one of the official duties of a head of state.'³⁴

In the *Arrest Warrant* case the three judges of the International Court of Justice formulated this argument as follows:

'It is now increasingly claimed in the literature [...] that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform [...]. This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public state acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. [...] See [...] the speeches of Lords Hutton and Phillips of Worth Matravers in *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet* ('Pinochet III'); and of Lords Steyn and Nicholls of Birkenhead in 'Pinochet I', as well as the judgment of the Court of Appeal of Amsterdam in the Bouterse case (Amsterdam Court of Appeal, 20 November 2000, para. 4.2).'³⁵

The objection that can be made to this argument is that international crimes are in many cases committed precisely by those persons who are able to use the

resources available to a state. Sometimes the international crimes even form part of state policy.³⁶

As an element of state involvement can be shown in practice in many international crimes, the argument that crimes cannot be normal functions of a state and cannot therefore form part of the duties of a state official is not sufficiently convincing as a legal ground for limiting functional immunity.³⁷

A *second approach* that receives much attention in the literature assumes that the commission of international crimes entails a violation of peremptory norms of international law (*jus cogens*).³⁸ These norms take precedence over other norms of international law. A claim of immunity in cases involving violation of *jus cogens* norms before foreign national courts should therefore be excluded.³⁹

However, this argument ignores the difference between the substantive nature of *jus cogens* norms and the procedural character of immunity rules. The prohibition on violating *jus cogens* norms is a prohibition of crimes such as genocide or torture and does not include the requirement that jurisdiction can be exercised by foreign states.

A variant of this argument is that where breaches of *jus cogens* occur states have an obligation to exercise universal jurisdiction. Universal jurisdiction means that all states have the right to prosecute anyone suspected of certain crimes. According to this view, the obligation to assume universal jurisdiction takes the form of a *jus cogens* norm, but no basis for this can be found in international law. In this context the CAVV would refer to the case of *Al-Adsani v. United Kingdom* before the European Court of Human Rights, in which the Court held that state immunity is not set aside by civil claims for damages on the grounds of a violation of a *jus cogens* norm, in this case the prohibition of torture.⁴⁰ The Court:

'while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.'

In practice, the principle of universal criminal jurisdiction is actually not often applied to its full extent because states tend to restrict its operation. For example, this principle is applied in the Netherlands under the International Crimes Act only to people who are in Dutch territory.⁴¹ As explained in section 3.4.2, obligations under

international law to exercise full or limited universal jurisdiction are imposed in conventions and are also based in a number of cases such as genocide and torture on customary international law.

This argument too is regarded by the CAVV as insufficiently convincing.

The CAVV prefers a *third approach*, namely the argument that a claim to functional immunity fails precisely because the charge is one of committing international crimes.⁴² This argument is based on the individual liability of persons for international crimes, regardless of whether they represent a state. International crimes are committed by persons, even if in so doing they use the resources of a state or implement state policy. The perpetrator violates international norms. This is separate from any parallel liability of the state for such acts. Whereas, according to classical international law, the acts of state officials in the performance of their duties can be imputed only to the state, the evolution of international law with respect to international crimes means that the person who commits the crime can also now be held responsible for it.

This approach accepts the individual criminal responsibility of persons for international crimes as an independent legal principle and is not dependent on more indirect reasoning as in the case of two previous approaches.

The CAVV would emphasise that the choice of this approach is also a matter of legal policy, since the relevant development in international law has not yet fully crystallised. Ultimately, it is about balancing the importance of ensuring the smooth conduct of international relations against the importance of combating the impunity of perpetrators of international crimes. As long as high-ranking officials are in office, greater weight may have to be given to the former. But once they no longer hold office greater weight can be given to the latter.

By adopting this approach the Netherlands can make a useful contribution to the formation of customary international law, which is, after all, dependent upon state practice.

3.4.1 Court judgments

The three approaches discussed in the previous section have attracted both support and criticism in judgments given by national and international courts. The joint separate opinion of the three judges of the International Court of Justice in the *Arrest Warrant* case, to which reference has already been made, cites judgments that often serve to support the view that international crimes cannot be a state

function or a state act, including the cases in the United Kingdom on the extradition of former Chilean head of state Augusto Pinochet to Spain.⁴³ In the final decision on this case (*Pinochet III*), Lords Hatton and Phillips supported this view, but it was not shared by Lord Goff.⁴⁴

The second approach discussed in section 3.4 also received support in *Pinochet III*,⁴⁵ as well as in the *Ferrini* and *Lozano* cases before the Italian Court of Cassation.⁴⁶ However, this argument was refuted in the *Al-Adsani* case, to which reference has already been made, before the European Court of Human Rights.⁴⁷

Support for the argument that a claim to functional immunity fails precisely because the charge is one of committing international crimes can be found in the cases heard by the Nuremberg and Tokyo criminal tribunals after the Second World War.

Article 7 of the Nuremberg Charter reads:

‘The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.’⁴⁸

According to Kolodkin, article 7 reflects the general agreement among the states concerned that immunity was inapplicable to the state officials tried in Nuremberg. He argues, however, that this does not seem to confirm the existence of a general norm of customary international law regarding the absence of functional immunity in the case of international crimes.⁴⁹

Kolodkin also comments on cases generally cited by non-governmental organisations that favour this approach.⁵⁰ In discussing them he points out, for example, that in certain cases the state of nationality of the person concerned did not claim immunity, as in the case of the former head of the Afghan security service before the Dutch Supreme Court.⁵¹ In other cases immunity was waived by the state of nationality of the person concerned,⁵² or the state decided to try the person concerned itself.⁵³ A case in which an arrest warrant was issued against Rose Kabuye, a Rwandan government official, led to the severance of diplomatic relations between Rwanda and France. The case was ultimately discontinued.⁵⁴

It may therefore be concluded that no uniform picture emerges from the cases before national and international courts.

3.4.2 Limitation of immunity under treaty obligations

Support for the approach chosen by the CAVV can be found in conventions that make international crimes punishable. However, these conventions concern particular crimes and have a well-defined system of rules. Although they contribute to the development of customary international law, they can by no means be equated with such law. The relevant conventions in this connection are the Convention on Genocide (1948),⁵⁵ the Geneva Conventions (1949), which make war crimes punishable,⁵⁶ the UN Convention against Torture (1984)⁵⁷ and the Convention for the Protection of All Persons from Enforced Disappearance (2006).⁵⁸ The Committee will first consider whether the obligations in these conventions actually apply to state officials. It will then examine whether, on the basis of these conventions, parties are under an obligation to prosecute state officials and to provide possibilities for obtaining redress for injustice suffered. Against this background the Committee will discuss the scope for claiming immunity.

3.4.2.1 Individual responsibility of state representatives

Article IV of the Genocide Convention, insofar as relevant, provides that:

‘Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.’

This provision leaves no doubt that public officials can be held liable for genocide.

The Geneva Conventions contain no provisions that refer explicitly to war crimes committed by state officials. However, as the conventions establish norms to be observed by members of the armed forces during armed conflicts it can be inferred that they also apply to state officials. Indications of this can also be found in the preparatory acts.

Clear evidence that state officials can be held responsible for acts of torture is contained in the provisions of the Convention against Torture. The definition of the crime of torture in the convention requires the involvement of an official representative of the state. This results from the words of article 1 of the convention that are italicised below:

‘For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted

by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanction.'

Article 2 of the Convention for the Protection of All Persons from Enforced Disappearance describes deprivation of liberty by agents of the state as enforced disappearance.⁵⁹

It may be noted that each of the conventions referred to above applies to agents of the state in respect of violations of the obligations contained in it.

3.4.2.2 Rights and obligations in respect of criminal prosecution and civil redress

Each of the conventions discussed here has its own system of rules regulating the obligation to prosecute.

Under article 6 of the Genocide Convention this obligation applies only to the state where the genocide was committed or to an international penal tribunal that has jurisdiction.⁶⁰ Since the conclusion of the convention in 1948, the crime of genocide has evolved into a *jus cogens* norm. Often it is assumed that, as a corollary, the application of the principle of universal criminal jurisdiction has been accepted in relation to this crime. This power to exercise universal jurisdiction extends to state officials, but does not mean that there is an obligation to apply universal jurisdiction and that no claim to functional immunity can therefore be made.

Each of the four Geneva Conventions contains an identical provision obliging the Contracting Parties:

'to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.'⁶¹

The text of this provision leaves no room for doubt that states are obliged to prosecute or extradite in the event of grave breaches of these conventions and that the national courts of states other than those of the suspects are competent for this purpose.

Article 5 of the Convention against Torture contains an obligation for the state party to establish its jurisdiction in respect of all alleged offenders, including non-nationals who are present in its territory, or to extradite these alleged offenders.⁶²

Article 9, paragraph 1 of the Convention for the Protection of All Persons from Enforced Disappearance provides that each state party must take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance.⁶³ Moreover, article 11, paragraph 1 provides that persons who are suspected of the offence and are found in the territory of a state party must be tried or extradited or surrendered to another state party for trial.⁶⁴

The CAVV notes that, in cases of genocide, serious war crimes, torture and enforced disappearance, all states – as party to these conventions and under customary international law – are competent and sometimes obliged under international law to search for and prosecute persons who have been guilty of these offences, irrespective of their status as state officials.

As regards civil claims for damages by victims of torture, article 14 of the Convention against Torture provides that state parties to the convention must include safeguards in their legal system for this purpose. Article 14 reads:

‘Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.’

This obligation relates only to the state in whose territory the torture took place.⁶⁵ Article 5, which provides that the states parties to the convention are obliged to establish jurisdiction for the purpose of prosecution, does not apply to article 14, and the notion that article 14 entails extraterritorial jurisdiction has hitherto been rejected.⁶⁶

Article 24, paragraphs 4 and 5 of the Convention for the Protection of All Persons from Enforced Disappearance provides that victims of enforced disappearance have a right to reparation and compensation, including material and moral damages.⁶⁷

3.4.2.3 Impossibility of claiming functional immunity

None of the conventions discussed above contains an article on immunity. Nor was the subject of immunity considered when the Geneva Conventions, the Convention against Torture and the Convention for the Protection of All Persons from Enforced Disappearance were drafted.⁶⁸ The purpose of including international crimes in these conventions was to create international norms in this field rather than to incorporate these norms into general international law or to adjust general international law. The connection with the general rules on immunity was not explicitly examined.

The existence of *functional* immunity for crimes prohibited under treaty law cannot be assumed. The Genocide Convention, the Convention against Torture and the Convention for the Protection of All Persons from Enforced Disappearance are specifically intended to cover state officials. The same also appears to be true of the Geneva Conventions. If it were to be possible for state officials, in the event of prosecution by a foreign state, to evade the operation of these conventions by alleging that the act in question was committed in an official capacity and is covered by functional immunity, this would be contrary to both the letter and the spirit of the conventions.⁶⁹

3.5 The International Criminal Court

The trend towards limiting impunity in the case of *international* crimes is also reflected in the establishment of *international* criminal tribunals over the last two decades.⁷⁰ The statutes of these tribunals cast a different light on the traditional concept of state sovereignty as regards state officials who commit international crimes.⁷¹

The trial of perpetrators of international crimes by international courts is not the subject of this advisory report, which instead deals with the dilemma posed by respect for immunity by national courts on the one hand and impunity for international crimes on the other. Nonetheless, the CAVV considers it worthwhile to briefly discuss the International Criminal Court.

Within the limits specified in the Rome Statute, the International Criminal Court has general jurisdiction over the international crimes defined in the Statute.⁷² On the basis of the principle of complementarity laid down in the Statute, the ICC may exercise its power of prosecution only if a state party is unable or unwilling to do so

or to extradite the person concerned. For states that are party to the Statute, this means that they must create the power under national law for the national courts to try the crimes defined in the Statute, in so far as this power does not already exist. Although such an obligation is not expressly included in the Statute, the Explanatory Memorandum to the International Crimes Act assumes that the Statute entails an implicit obligation to establish universal jurisdiction for the crimes specified in the Statute.⁷³

Where a person suspected of an international crime is prosecuted on the basis of the complementarity principle, the question may arise of whether the suspect can claim immunity. Article 27 of the Statute concerns persons acting in an official capacity and reads as follows:

'Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

Article 27, paragraph 1 confirms that officials are liable to criminal responsibility. Paragraph 2 explicitly provides that officials may not claim immunity before the ICC. It could be argued that it follows from article 27 that a claim to immunity is no longer acceptable between parties to the Statute. Only then could national courts fully apply the principle of complementarity. However, it is not expressly apparent from the Statute that it follows from article 27 that national courts should disregard any claim for immunity on the part of state officials. It cannot be assumed that state parties, by ratifying the Statute, have *implicitly* waived the personal and functional immunity of state officials in relation to other states.

The CAVV therefore concludes that the existing immunity rules under international law are applicable in the case of national proceedings not based on a request of the ICC. This is in accordance with the choice made by the Netherlands in section 16 of the International Crimes Act, which leaves the personal immunity of foreign state officials intact and does not make any exception for parties to the Statute.

The situation is different where the ICC requests a state party to transfer a suspect. In such a case the state in question should comply with the request. No immunities

may prevent this. Only where the suspect is a national of a state that is not party to the Statute would the situation be different. Under article 98 of the Statute, the ICC may not require a state party to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state in cases where the ICC requests the surrender of a suspect. The relationship between article 27, paragraph 2 and article 98 has not yet been tested before the ICC.

In the CAVV's opinion, it is not possible to read articles 27 and 98 as either proving or disproving that it is now accepted in international law that a state official is not entitled to functional immunity in the event of prosecution by a foreign state for international crimes.⁷⁴ However, as mentioned earlier, the creation of an obligation to establish universal jurisdiction is at odds with the granting of functional immunity to state officials. The aim of establishing international criminal courts is precisely to ensure that the punishment of international crimes is as effective as possible. The limitation of functional immunity advocated by the CAVV is in keeping with this aim.

3.6 Summary

This chapter discusses in a general sense the relationship between the prosecution of international crimes and the immunity rules which can obstruct such prosecution but are necessary for the proper conduct of international relations. On the basis of the literature and national case law, the CAVV concludes that in proceedings concerning international crimes claims for personal immunity by entitled persons should be honoured. As regards the relationship between the prosecution of international crimes and claims for functional immunity, the CAVV notes that there is a marked trend towards a situation in which the prosecution of international crimes takes precedence over functional immunity. This is in keeping with the systems based on the conventions that make international crimes punishable. The subject of the relationship between punishment for international crimes to which these conventions relate on the one hand and the immunity of state officials who commit these crimes on the other was not raised during the negotiations on these conventions. The CAVV recommends that Dutch negotiators explicitly raise the subject of this relationship in the future.

A telling indication of the evolution of this exception is the establishment of international criminal courts, including the International Criminal Court. The chapter

also briefly discusses the extent to which trial by national courts and trial by the ICC overlap.

4. CATEGORIES OF PERSONS THAT ENJOY PERSONAL IMMUNITY

4.1 Section 16 of the International Crimes Act as guideline

It was noted in chapter 3 that there is a trend in international law towards a situation in which functional immunity cannot be claimed in the event of prosecution for international crimes. This means that only personal immunity can be successfully claimed in order to evade prosecution for international crimes by a foreign state. This chapter discusses the categories of persons entitled to personal immunity by reference to section 16 of the International Crimes Act, which 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.’⁷⁵

The best-known group of state officials to enjoy personal immunity consists of incumbent heads of state, heads of government and ministers of foreign affairs. This threesome is discussed in section 4.2. This section also answers the question raised in the request for advice concerning the scope of the immunity of these state officials.⁷⁶ Sections 4.3 and 4.4 answer the second question in the request for advice, which is, in brief, whether there are other foreign state officials, besides the three named above, who are entitled to personal immunity.

4.2 Heads of state, heads of government and ministers of foreign affairs

The *Arrest Warrant* case referred to above concerns the personal immunity of ministers of foreign affairs. However, the findings of the International Court of Justice also apply to heads of state and heads of government. According to the ICJ, a person who holds these offices is ‘*recognized under international law as representative of the State solely by virtue of his or her office*’.⁷⁷ The ICJ also states:

‘*that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal justice and inviolability.*’⁷⁸

This shows that heads of state, heads of government and ministers of foreign affairs enjoy full immunity by virtue of their official capacity.

The ICJ goes on to state that this immunity is of limited duration:

'after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States.'

and more specifically that:

*'[p]rovided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity'*⁷⁹

It follows that, according to the ICJ, the immunity of heads of state, heads of government and ministers of foreign affairs is connected with their official capacity and limited to their term of office and that after they cease to hold office do not enjoy immunity for acts performed in a private capacity while in office. After their term of office ends they retain only functional immunity. This functional immunity applies to all acts carried out in the performance of their duties, but does not apply, as advocated in chapter 3, to international crimes committed while in office.

Heads of state

The personal immunity of incumbent foreign heads of state under customary international law is virtually unchallenged in international law.⁸⁰ Heads of state have traditionally been equated with the state. As they were deemed to personify the state, the principle of the sovereign equality of states was therefore considered applicable to them. However, in the *Mutual Assistance* case between Djibouti and France, the International Court of Justice, quoting from the *Arrest Warrant* case, held as follows:

*'A Head of State enjoys in particular "full immunity from criminal jurisdiction and inviolability" which protects him or her "against any act of authority of another State which would hinder him or her in the performance of his or her duties.'*⁸¹

In this way the ICJ formulated a more functional approach to immunity rather than an approach based solely on status and dignity. Nonetheless, the latter continue to play a role, as noted in section 3.2.

Heads of government

Few sources exist to shed light on the immunity of heads of government. The prevailing view is that heads of government are entitled to personal immunity in the same way as heads of state. In practice, heads of government now often have a more important role than heads of state in the political systems of many states.⁸²

Ministers of foreign affairs

The findings of the International Court of Justice in the *Arrest Warrant* case in 2002 concerning the personal immunity of ministers of foreign affairs have led to debate in the literature. Whereas the immunity of heads of state and government in international law has been traditionally based mainly on status, the ICJ based its support for the full immunity of the minister of foreign affairs on functional grounds. The ICJ mentions a number of factors that distinguish the foreign minister from other ministers, such as responsibility for the diplomatic activities of a state, responsibility for the acts of diplomatic agents and the presumption that he is authorised for this purpose to bind the state that he represents. The ICJ points out that:

*'a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of a State solely by virtue of his or her office.'*⁸³

Although this approach in the *Arrest Warrant* case reflects the most important school of thought in the literature and in the judgments of national courts, there is a different school of thought that distinguishes between heads of state and government on the one hand and ministers of foreign affairs on the other.⁸⁴ Proponents of this view dispute the notion that the minister of foreign affairs enjoys personal immunity under customary international law. The general reason given for this view is that heads of state and heads of government personify the state, whereas the immunity of all other state officials depends on their official position.⁸⁵ Accordingly, the minister of foreign affairs should be treated in the same way as other members of government.

The CAVV notes that this discussion on the personal immunity of incumbent ministers of foreign affairs is taking place, but would also point out that the passage discussed here from section 16 of the International Crimes Act adequately reflects the current state of international law.⁸⁶

4.3 'Other persons insofar as their immunity is recognised under international law'

The second question put by the Minister to the CAVV is:

'Are there other foreign state officials, besides heads of state, heads of government and ministers of foreign affairs, who enjoy immunity from (criminal) jurisdiction? Is it possible to formulate criteria to this end? What would be the scope of this immunity?'

The specified categories include foreign state officials who enjoy immunity under conventions. Before this category is discussed by reference to section 16 (b) of the International Crimes Act in section 4.3.2 below, the CAVV will explain how it interprets the words ‘other persons insofar as their immunity is recognised under international law’ in section 16 (a) of the Act. As section 16 (b) concerns immunity based on conventions, these words mean that the recognition under international law referred to in section 16 (a) must be based on customary international law.

4.3.1 The immunity of state officials other than heads of state, heads of government and ministers of foreign affairs

As noted in section 4.2 above, recognition of the personal immunity of ministers of foreign affairs by the International Court of Justice in the *Arrest Warrant* case has proved controversial. This applies even more to an expansion of the categories of persons entitled to immunity. For such an expansion there are insufficient international precedents to support the conclusion that customary international law exists on this point. In view of the growing acceptance described in chapter 3 that punishment for international crimes should, in principle, take precedence over immunity, the CAVV advocates that extreme caution should be observed when considering whether to expand the categories of persons entitled to claim personal immunity.⁸⁷ The CAVV is therefore not in favour of granting the personal immunities presently enjoyed by incumbent heads of state, heads of government and ministers of foreign affairs to other government ministers, members of parliament, heads of national administrative authorities and (high-ranking) officials.

4.3.2 Immunity in the case of official missions

Nonetheless, the CAVV recognises that the smooth conduct of international relations requires that persons other than the threesome discussed above should, when the occasion arises, be able to rely on being able to perform their duties on behalf of the state without interference and, where necessary, claim full immunity. If a representative of a state pays an official visit to another state, this person should, in the opinion of the CAVV, be able to claim full immunity, even in cases concerning international crimes. In this context, the CAVV would prefer to employ the term ‘full immunity’ rather than ‘personal immunity’ since the immunity is not linked to the position of the person claiming immunity but to his duties at a given moment. The CAVV bases the granting of immunity in such cases on customary international law.⁸⁸

In the *Arrest Warrant* case Belgium argued that state representatives who pay an official visit to Belgium are entitled to full immunity, in any event to the extent that the host state must refrain from acts that could hinder the work of the mission.⁸⁹ Despite an outstanding arrest warrant against the Congolese minister of foreign affairs for crimes against humanity and war crimes, Belgium would not take coercive measures against him if he were to pay an official visit to Belgium. This position has been confirmed in the judgments of national courts. In two British legal actions in which a defence minister and a minister for international trade were charged with international crimes they were granted full immunity for an official visit. Signs of a similar approach can also be found in cases decided by US and German courts.⁹⁰ Another argument for granting full immunity during an official mission is a comparison with the position of government officials who attend a meeting of an international organisation as a representative of a member state and are entitled in that capacity to full immunity from criminal jurisdiction for the duration of the visit.⁹¹

The immunity of persons who represent a state during an official visit is also one of the subjects dealt with in the UN Convention on Special Missions (1969).⁹² In April 2011, 38 states were parties to the convention. The Netherlands has not signed it because, according to official sources, it wishes to retain flexibility in dealing with official missions.⁹³ The convention was modelled on the Vienna Convention on Diplomatic Relations and makes little distinction between facilitating relatively long-term stays of diplomats in another country and facilitating temporary special missions. The CAVV considers, for example, that some of the provisions such as exemption from taxation and dues and the protection of the premises in which the special mission is established may prove hard to implement in practice.

In view of the fairly far-reaching nature of the Convention on Special Missions, views on whether it also enjoys customary international law status are divided. Some argue that the entire convention constitutes customary international law, others that there is nothing whatever to suggest that it should be accorded the status of customary law, and a third group contends that certain provisions enjoy the status of customary law.⁹⁴

It is apparent from the preparatory acts of the Convention on Special Missions that the members of special missions should enjoy full immunity in the interests of ensuring the smooth conduct of international relations.⁹⁵ In its final report to the General Assembly of the United Nations, the International Law Commission of the

UN noted that it was now generally recognised that states were under an obligation to accord the facilities, privileges and immunities specified in the convention to special missions and their members.⁹⁶

For this reason and in view of the national case law and literature referred to above, the CAVV concludes that there is a sufficient basis for an obligation under customary international law to accord full immunity to the members of official missions.⁹⁷ However, the CAVV doubts whether either the Convention on Special Missions as a whole or all its provisions on privileges and facilities have the status of customary law.

Nonetheless, the preparatory acts of the convention, in addition to other sources, provide important indicators of how full immunity for members of official missions could be framed.

Article 1 (a) of the convention defines the term 'special mission' as:

'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.'

The preparatory acts shed little light on how this provision should be interpreted. However, it is clear from the text of article 1 (a) that the convention relates only to missions that perform tasks in relation to the receiving state. In a case before an American court, proceedings were brought against the heir to the British throne, the Prince of Wales, for the treatment of prisoners in Northern Ireland. However, the US Department of State took the position that the visit of Prince Charles, who was in the country to receive an honorary doctorate, was a 'special diplomatic mission' and that the Prince therefore enjoyed immunity. The United States is not party to the convention and clearly applies a broader definition of 'special mission' than that given in article 1 (a), since it takes the view that the mission may also concern non-government-related activities in the receiving country.

Article 1 (a) assumes that a special mission acts in the receiving state with its consent.

In addition, article 2 reads:

'A State may send a special mission to another State with the consent of the latter, previously obtained through the diplomatic or another agreed or mutually acceptable channel.'

During the drafting of the convention, a few states tried in vain to record in the text that the consent should be express. The fourth (and last) report of the Special Rapporteur of the International Law Commission lists the different ways in which such consent can be arranged:

- (a) An informal diplomatic agreement providing that a special mission will be sent and received;*
- (b) A formal treaty providing that certain questions will be discussed and settled through a special mission;*
- (c) An offer by one State to send a special mission for a specific purpose, and the acceptance, even tacit, of such a mission by the other State;*
- (d) An invitation from one party to the other to send a special mission for a specific purpose, and the acceptance of the invitation by the other party.⁹⁸*

The CAVV notes that on the basis of this passage personal immunity cannot be claimed if a representative of a state operates in the territory of the receiving state without its consent. This is also confirmed in national case law and in the literature.⁹⁹

Under the Convention on Special Missions participation in official missions is not limited to state officials.¹⁰⁰ This broad interpretation makes it possible under the convention to include, for example, family members who accompany state officials on special missions (such as state visits) or persons (such as a family member of a high-ranking dignitary or a former state official) who admittedly do not have or no longer have an official position, but who perform on behalf of their state a task in another state that meets the condition for full immunity, namely the smooth conduct of interstate relations, and should therefore enjoy full immunity during their visit.¹⁰¹

Customary international law contains few sources on the status of family members of state officials. This immunity is often an extension of that of the state official on an official mission.¹⁰² Although the sources are few and far between, the CAVV considers it safe to conclude that family members of a head of state, head of government or minister of foreign affairs who accompany the person concerned during an official visit or who represent their state independently during an official mission enjoy the same immunity as a state official on an official mission.¹⁰³

The Convention on Special Missions also allows scope for immunity to be granted to a mission that does not belong to the government of the sending state. An example would be where a mission representing an opposition faction in an internal conflict visits the territory of another state to conduct peace negotiations. However,

the sending state must then notify the receiving state that members of the opposition belong to the special mission. If non-state representatives of one or more parties involved in an internal conflict visit another state without consent or notification having been given by the sending state, they are not entitled to immunity under the Convention on Special Missions or under customary law derived from it. It will then be a matter for the receiving state – where necessary and insofar as possible under the law of that state – to arrange for the immunity of these persons, so that they can carry out their mission without interference. The same applies, where desirable, to people who represent a unrecognised state. The convention also contains conditions for notification and acceptance of the members of special missions.¹⁰⁴

The CAVV notes that members of an official mission may be entitled to full immunity during the term of the mission under the Convention on Special Missions and the related customary international law. This full immunity is not subject to any limitation in respect of criminal or civil proceedings relating to international crimes. As members do not have full immunity other than during the official mission, situations may occur in which a criminal or civil action has already been brought against a member of the mission. The CAVV considers that in such a case no act or measure that could limit the freedom of the person concerned may be undertaken during the term of the mission.¹⁰⁵

When a case comes before a foreign court the question arises of who should claim immunity and at what point. It is apparent from the case already cited between Djibouti and France before the International Court of Justice that the sending state can be expected to expressly submit such a claim.¹⁰⁶

As noted above, in cases before American courts confirmation provided by the US Department of State of the immunity of a representative of another state is decisive.¹⁰⁷ The Dutch Ministry of Foreign Affairs does not have this power. This could have undesirable consequences, particularly in civil cases brought not against the state but against a state official and certainly in cases where the defendant does not enter an appearance. Indeed, it might even result in an infringement of international law by the Netherlands. However, the number of persons entitled to immunity in cases connected with international crimes is small and the courts will not lightly disregard the question of immunity. Nonetheless, the CAVV recommends

that measures be taken to ensure that the courts can act on their own initiative to test for immunity when the occasion arises.

The CAVV notes that a bill to amend the Code of Civil Procedure has been presented to the Senate with a view to incorporating in the Code provisions to ensure that the courts can test for compliance with international law obligations.¹⁰⁸

4.4 Immunity under conventions

Where persons may enjoy personal (full) immunity under a convention (see section 16 (b) International Crimes Act), this immunity is decided by the terms of the relevant convention. This section discusses the most important conventions that regulate immunity, but is not intended to be comprehensive. The possibility that other conventions provide for similar immunity cannot be excluded.¹⁰⁹

4.4.1 Diplomatic staff and administrative and technical staff of embassies

The most important convention in connection with section 16 (b) of the International Crimes Act is the Vienna Convention on Diplomatic Relations.¹¹⁰ Under this convention diplomatic staff and administrative and technical staff of embassies enjoy personal immunity from the criminal jurisdiction of the receiving state. Although the immunity of diplomatic staff from civil and administrative jurisdiction is subject to a few limitations described in the convention, these are relevant in this advisory report solely in the sense that they do not limit immunity for international crimes. The administrative and technical staff also have certain functional immunity from civil and administrative jurisdiction.¹¹¹ The immunity starts at the moment when the employee enters the territory of the receiving state to take up his job. When the job ends, the immunity remains in force for acts performed in his official capacity.¹¹²

It should also be noted that the Vienna Convention on Diplomatic Relations codified long-standing customary law. States that are not a party to this convention can invoke customary international law for their diplomats. They then belong to the category of 'other persons insofar as their immunity is recognised under international law', as referred to in section 16 (a) of the International Crimes Act.

4.4.2 Representatives of member states of international organisations

On the basis of conventions on the immunity of international organisations, representatives of the member states of these organisations generally enjoy full immunity from criminal jurisdiction when attending meetings of the organisation.¹¹³

This is limited to the duration of the meeting plus a reasonable period for the journey to and from the meeting. After the meeting there is full immunity from criminal jurisdiction for acts performed in the course of the person's duties. Immunity from civil and administrative jurisdiction is generally functional.

4.5 Conclusions

This chapter concerns the different categories of person entitled to personal immunity. The CAVV shares the view of the legislator, as reflected in section 16 of the International Crimes Act, that incumbent heads of state, heads of government and ministers of foreign affairs are entitled to personal immunity. The CAVV would stress that this personal immunity is linked to their official capacity and there is no reason to grant this far-reaching form of immunity to other people. On the basis of, above all, national case law and literature and the preparatory acts of the Convention on Special Missions, the CAVV concludes that members of official missions are entitled to full immunity. Where immunity is enjoyed under conventions, the CAVV notes that the conventions concerned are decisive.

5. THE ANSWERS TO THE QUESTIONS IN THE REQUEST FOR ADVICE

5.1 What is the scope of the immunity from criminal jurisdiction of foreign heads of state, heads of government and ministers of foreign affairs under international law?

It follows from section 16 of the International Crimes Act that 'foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office' are exempt in the Netherlands from prosecution for international crimes. The CAVV notes that the personal immunity of incumbent foreign heads of state and heads of government is undisputed in international law, but that the notion that ministers of foreign affairs should have personal immunity is not shared by everyone in the literature. In the opinion of the CAVV, however, the relevant passage in section 16 of the International Crimes Act adequately reflects the state of international law on this point. Personal or full immunity means that a person enjoys immunity for all his acts whether performed in an official or in a private capacity.

As the words 'as long as they are in office' in section 16 suggest, the personal immunity of the state officials mentioned is tied to their official capacity and therefore limited to their term of office. They enjoy functional immunity after their term of office for acts performed during their term of office, i.e. immunity for acts performed in the course of their official duties. This immunity does not extend, however, to international crimes committed by the persons concerned in the course of their duties.

Not all measures that can be taken under the law of criminal procedure affect personal immunity. The CAVV considers that the International Court of Justice has formulated a serviceable criterion for this purpose. According to this criterion, personal immunity is infringed only by (government) measures that constrain the ability of the person concerned to perform his duties without interference outside the territory of his own state.

5.2 Are there other foreign state officials, besides heads of state, heads of government and ministers of foreign affairs, who enjoy immunity from (criminal) jurisdiction? Is it possible to formulate criteria to this end? What would be the scope of this immunity?

In addition to the categories of persons mentioned in the question, certain state officials can enjoy personal immunity under conventions, such as the Vienna Convention on Diplomatic Relations and conventions granting immunity to representatives of member states of international organisations.

Members of official missions are entitled to immunity under customary international law. Full immunity of this kind is not linked (as in the case of the categories of state officials who were the subject of question 1) to the office and term of office, but to the presence of the relevant mission in Dutch territory. The underlying reason for this immunity is to facilitate the smooth conduct of international relations. Section 5.2.1 contains recommendations on this point.

Traditionally, all state officials have enjoyed functional immunity from jurisdiction. However, the CAVV considers that for reasons of legal policy this functional immunity should yield where international crimes are to be prosecuted.

5.2.1 Recommendations on official missions

In the CAVV's opinion all members of an official mission are entitled to full immunity, provided that the Dutch authorities have, at the very least, consented to the mission and been informed of its composition. The CAVV recommends that the Minister formulate policy on this subject and formalise it, for example in a letter to the States General, with notification to the judiciary. This policy could be that, subject to certain conditions, the members of an official mission should be designated as 'other persons' (i.e. persons other than incumbent heads of state, heads of government and ministers of foreign affairs) whose immunity is recognised under international law, so that they are covered by section 16 (a) of the International Crimes Act. The CAVV also recommends that the terms and conditions for granting such immunity be defined, to which extent the framework provided by the Convention on Special Missions and its preparatory acts will be useful. Possible examples would be the object of the mission and whether it may include activities that do not directly concern (central) government, the terms for notification of the mission and its members, acceptance of the mission and its composition, and the starting and finishing dates of the mission.

This requires political decisions. One such important decision is whether it would be desirable and acceptable to grant full immunity to persons other than state officials for the performance of or participation in an official mission. An example would be immunity for family members of heads of state, heads of government and ministers of foreign affairs, and for non-state members of an official mission. Although this is permitted in the Convention on Special Missions, the CAVV considers that the more remote the task of the mission and its members is from the government of the

foreign state concerned the stricter should be the conditions that are set. Precedence should naturally be given to ensuring that there is no interference with the interstate relations intended by the mission. It goes without saying that the policy to be formulated should in no way breach the obligations of the Netherlands under international law, including its obligations as a state party or headquarters state of international criminal tribunals.

Another option would be to amend section 16 of the International Crimes Act in such a way as to provide a statutory basis for the immunity of members of official missions. This would have the advantage of regulating by statute the departure from national criminal law. First, there could then be no uncertainty about the relationship between national criminal law and the relevant customary international law. Second, legislation could also regulate matters that have no status or only unclear status under customary law. If desired, for example, the full immunity of members of non-state missions or the reception of representatives of an unrecognised state could also be regulated by law.

As the category of persons entitled to personal immunity in this connection will in practice be relatively difficult to define, the Committee would also recommend in answer to this question that provision for the courts to test for immunity on their own initiative should be regulated by statute.

5.3 Do these persons also enjoy immunity from administrative and civil jurisdiction?

Immunity from administrative jurisdiction has not been dealt with in this advisory report since it is inconceivable that a case involving an international crime would come before the Dutch administrative courts.

State officials who, in view of the answers to the first and second questions, enjoy full immunity from criminal jurisdiction also enjoy full immunity from civil jurisdiction, unless a convention that is applicable to them provides differently. Termination of full immunity from criminal jurisdiction (for example, where the post ceases to exist) also signifies termination of the full immunity from civil jurisdiction.

Moreover, the CAVV considers that the criterion that personal immunity is infringed only where measures have the effect of limiting the ability of the official to exercise his duties without hindrance outside the territory of his own state also applies in civil

cases. It believes, however, that in civil cases the courts should observe restraint in establishing this on account of the principle that states should respect each other in the interests of mutual relations.

5.4 Amendment of the Disposal of Criminal Complaints (Offences under the International Crimes Act) Instructions

The CAVV recommends that in the near future the Disposal of Criminal Complaints (Offences under the International Crimes Act) Instructions should be amended to bring them into line with the findings in this advisory report.¹¹⁴ Section 3.1.1 of these Instructions contains the following passage:

‘Prosecution under this Act is excluded in respect of foreign heads of state, heads of government and ministers of foreign affairs as long as they are in office, and in respect of other persons insofar as their immunity is recognised by customary international law. The latter category includes diplomats accredited to the Netherlands, former heads of state, former heads of government and former ministers of foreign affairs. Immunity does not apply in respect of acts committed by former state officials prior to or following their term of office, or acts performed by them in their private capacity during their term of office.’

This text conflicts with this advisory report in two respects. First, because it suggests that former heads of state, heads of government and ministers of foreign affairs continue to enjoy immunity once they are no longer in office for international crimes committed during their term of office. Second, because no mention is made of the immunity of members of official missions. The passage could therefore be amended as follows:

‘Prosecution under this Act is excluded in respect of foreign heads of state, heads of government and ministers of foreign affairs as long as they are in office, and in respect of other persons insofar as their immunity is recognised by customary international law. The latter category includes diplomats accredited to the Netherlands and members of official missions.’

As the categories of persons entitled to immunity are not specifically defined in this proposal, there will almost always be doubt about immunity under the Instructions and contact will therefore have to be sought with the Board of Procurators General, which can consult with the Ministry of Foreign Affairs where necessary.

Notes

¹ See *Report of the International Law Commission*, 62nd Session, GA Official Records 65th session, supplement no. 10 (A/65/10), p. 333; *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, UNGA, A/CN.4/601 and the *Second Report on immunity of State officials from foreign criminal jurisdiction*, A/CN.4/631, both written by Dr Kolodkin, Special Rapporteur. These reports are referred to in the present advisory report as 'Kolodkin I' and 'Kolodkin II' respectively.

² Letter ref. DJZ/IR-2009/289 of 18 December 2009 (see annexe).

³ Act of 19 June 2003, Bulletin of Acts and Decrees 2003, 270.

⁴ Rome Statute of the International Criminal Court, 17 July 1998, Dutch Treaty Series 2000, 120.

⁵ See notes 55, 56, 57 and 58.

⁶ See notes 110 and 112; note 92.

⁷ As regards customary law and the relationship between this law and conventions, see A. Nollkaemper, *The legitimacy of international law in the case law of the International Criminal Tribunal for the Former Yugoslavia*, in T. Vandamme and J.-H. Reestman, eds., *Ambiguity in the Rule of Law. The Interface between National and International Legal Systems*, Groningen (2001) p. 13, p.16.

⁸ According to article 38 of the Statute of the International Court of Justice (Dutch Treaty Series 1971, 55; 1987, 114), judicial decisions and the teachings of the most qualified publicists of the various nations constitute secondary sources of international law.

⁹ Known as territorial jurisdiction.

¹⁰ This is a reference to:

- the *active personality principle*, which confers jurisdiction on the Netherlands in relation to Dutch nationals abroad (see for example article 5, paragraph 1 of the Criminal Code, which confers jurisdiction in respect of Dutch nationals who commit an indictable offence abroad directed against the administration of justice of the International Criminal Court);
- the *passive personality principle*, which confers jurisdiction in respect of Dutch victims of indictable offences committed abroad (e.g. section 5 of the Wartime Offences Act provides that anyone who exposes a Dutch national to prosecution, deprivation of liberty etc. 'by or on account of the enemy or its helpers' is guilty of a criminal offence), and
- the *protective principle*, which aims to protect state interests against infringement by other states (under article 6 of the Criminal Code, certain indictable offences committed by Dutch officials abroad come under Dutch jurisdiction).

Another concept to the advisory report is *universal jurisdiction*, which predicates the authority of a state to assume criminal jurisdiction over an individual regardless of nationality or where the crime was committed.

¹¹ New York, 2 December 2004, Dutch Treaty Series 2010, 272. Article 5 reads: 'A state enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention'. By May 2011 the Convention had been signed by 28 states and ratified by 11. 30 ratifications are needed for the Convention to enter into force. In the Netherlands, according to official sources, signature is currently being discussed at interministerial level.

¹² In fact, the distinction between acting in an official capacity and acting in a private capacity is not always apparent. See, for example, L.T. Lee, *Consular Law and Practice* (1991) chapter 29, p. 483 ff. H.G. Schermers, *Internationaal Publiekrecht voor de Rechtspraak* (Public International Law for Use in Legal Practice) (1985) paras. 517-518.

¹³ See n. 11. Article 2 (1) of the Convention reads, insofar as relevant: 'for the purposes of the present Convention : [...] 'State' means: [...] (iv) representatives of the state acting in that capacity;'

¹⁴ *Case concerning an arrest warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium) 14 February 2002 I.C.J Reports 2002 p.3.

¹⁵ See D. Akande and S. Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, European Journal of International Law (2011) Vol. 21 no. 4, p. 815, p. 821; Kolodkin I, n. 1, para. 93; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergethal in the *Arrest Warrant* case, n. 14, para. 75: '[...] immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.'

¹⁶ UN Press Release L/ROM/6.r1; www.un.org/icc/pressrel/lrom6r1.htm

¹⁷ See Akande/Shah, n. 15, p. 818; Kolodkin II, n. 1, para. 55.

¹⁸ See n. 14, para. 54.

¹⁹ See n. 14, para. 58.

²⁰ See n. 14, para. 59.

²¹ In 2001 the IDI adopted a Resolution entitled 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law' (below: IDI Resolution 2001); the 'Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State' dates from 2009 (IDI Resolution 2009) and was based on a Preliminary Report (2005) and Final Report (2009) drawn up by Lady Fox. See *Annuaire de l'Institut de droit international, Session de Naples (2009) Vol. 73*. www.iil.org/idiE/resolutionsE.pdf

²² *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* 4 June 2008 I.C.J Reports 2008 p. 177.

²³ See n. 22; para. 157.

²⁴ See n. 22; para. 170.

²⁵ See also Kolodkin I, n. 1, para. 68 and note 138.

²⁶ See also *Tachiona v. Mugabe*, *American Journal of International Law*, vol. 95 (October 2001) p. 874. This case concerned service of process effected before the American civil courts on President Mugabe, head of state of Zimbabwe. The court held that this service of process 'would not demand the official's appearance in court nor subject him in other ways to the court's compulsory powers in a manner that could be deemed an assertion of territorial authority over the foreign dignitaries and, by extension, over the foreign state they represent.'

²⁷ For a list of cases in which courts of various states have allowed states to claim immunity for state officials see, for example, *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, House of Lords, Session 2005-06 [2006] UKHL 26, Lord Bingham of Cornhill, para. 10.

²⁸ LJN: AT5152, Provisional Relief Judge (*Voorzieningenrechter*), The Hague District Court, KG 05/432.

²⁹ See n. 27.

³⁰ *Ex parte Peru*, 318 U.S. 578, p. 589 (1943) ; www.supreme.justia.com.

³¹ United States District Court for the District of Columbia, Civ. No. 04-0649 (RJL). The findings of the Court are contained in part II: 'Foreign Policy Considerations Also Warrant Dismissal of this Action.' Bo Xilai was Minister of Trade of the People's Republic of China. See also *Chang Boon Kim v. Kim Yong Shik and David Kim*, *International Law Reports* 817 F 2d 1108 (1987); *Kilroy v. Windsor and others*, Civil Action No. C-78-291, United States District Court for the Northern District of Ohio, Eastern Division, 81 *International Law Reports* (1990) pp. 605-7; *Matar v. Dichter*, US Court of Appeals for the Second Circuit, 16 April 2009, Docket No. 07-2579-cv. However, see also *Tachiona v. Mugabe*, n. 26.

³² See Kolodkin II, n. 1, paras. 57 ff.

³³ Lord Hutton and Lord Browne-Wilkinson in *Pinochet III*, n. 43; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, n. 14, para. 85; Akande/Shah, n. 15, pp. 831/2.

³⁴ LJN: AA8395, Amsterdam Court of Appeal (*Gerechtshof*) 20/11/2000, consideration 4.2; www.rechtspraak.nl.

³⁵ Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, n. 14, para. 85. The complete text reads: 'It is now increasingly claimed in the literature (see for example, Andrea Bianchi, "Denying State Immunity to Violators of Human Rights", *46 Austrian Journal of Public and International Law* (1994), pp. 227-228) that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of *1º Congreso del Partido* (1978) QB 500 at 528 and (1983) AC 244 at 268 respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the *Eichmann* case; Supreme Court, 29 May 1962, 36 *International Law Reports*, p. 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet ("Pinochet III")*; and of Lords Steyn and Nicholls of Birkenhead in *Pinochet I*, as well as the judgment of the Court of Appeal of Amsterdam in the *Bouterse* case (Amsterdam Court of Appeal, 20 November 2000, para. 4.2.)' See n. 43 (*Pinochet*) and n. 34 (*Bouterse*).

³⁶ See, for example, the dissenting opinion of Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant* case, n. 14, p. 161, para. 36.

³⁷ See also IDI Final Report, n. 21, para. 51.

³⁸ There is no consensus in international law about which norms should be regarded as belonging to *jus cogens*. In general, *jus cogens* is held to include the prohibitions of genocide and torture, but not certain war crimes. See Akande/Shah, n. 15, p. 833 ff.

³⁹ See Kolodkin II, n. 1, paras. 63 ff.

⁴⁰ Application no. 35763/97, 21 November 2001.

⁴¹ It should be noted that universal jurisdiction exists in Dutch law not only under the International Crimes Act but also in respect of certain occurrences outside Dutch territory such as piracy at sea.

⁴² See Kolodkin II, n. 1, para. 68 ff.

⁴³ The subject of the extradition of the former Chilean head of state to Spain by the United Kingdom was raised on three occasions in the House of Lords, namely on 25 November 1998 (*Pinochet I*), 17 December 1998 (*Pinochet II*) and 24 March 1999 (*Pinochet III*); See www.parliament.the-stationery-office.co.uk.

⁴⁴ See n. 43 (*Pinochet III*); Lord Goff stated, 'The functions of, for example, a head of state are governmental functions, as opposed to private acts, and the fact that the head of state performs an act, other than a private act, which is criminal does not deprive it of its governmental character. This is true of a serious crime, such as murder or torture, as it is of a lesser crime.' See also Kolodkin II, n. 1, para. 58 ff.

⁴⁵ See n. 43. This was true of the view taken by Lord Millett: 'The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.'

⁴⁶ *Ferrini v. Repubblica Federale di Germania*, Corte di Cassazione, Joint Sections, Judgment 6 November 2003-11 March 2004, n. 5044. It should be noted that this case concerned state immunity, not the immunity of a state official. *Lozano v. Italy*, Appeal Judgment, Case No. 31171/2008. See Kolodkin II, n. 1, para. 63, note 146.

⁴⁷ See n. 40. See also the case of *Kalogeropoulos et al. v. Greece and Germany* (Application no. 28451/02 10 March 2005); Lord Bingham in the *Jones* case, n. 27.

⁴⁸ Can be found at http://en.wikipedia.org/wiki/London_Charter_of_the_International_Military_Tribunal.

⁴⁹ Kolodkin II, n. 1, para. 68, 69.

⁵⁰ See, for example, *Jones v. United Kingdom* (Application no. 34356/06), *Mitchell and Others v. United Kingdom* (Application no. 40528/06) Written Comments by Redress, Amnesty International, Interights and Justice; <http://www.interights.org/jones>

⁵¹ LJN BC7418 07/10063 www.rechtspraak.nl; See also Kolodkin II, n. 1, para. 69 at (b) and note 177 ('Dirty War' trial of former Argentine state officials in Italy).

⁵² Kolodkin II, n. 1, para. 69 at (d) and note 181 (trial of Argentine Navy captain *Scilingo* in Spain); para. 70 at (d), para. 16 and note 30 (trial in Senegal of Hissein Habré, former head of state of Chad).

⁵³ Kolodkin II, n. 1, para. 70 at (c) and notes 192-194 (Argentina's refusal to extradite military intelligence captain Astiz).

⁵⁴ Kolodkin II, n. 1, para. 70 at (a) and notes 183-189.

⁵⁵ Paris, 9 December 1948, Dutch Treaty Series 1960, 32.

⁵⁶ I. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; II. Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; III. Convention relative to the Treatment of Prisoners of War; IV. Convention relative to the Protection of Civilian Persons in Time of War; Geneva, 12 August 1949; Dutch Treaty Series 1951, 72, 73, 74, 75; Protocol additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); Bern, 8 June 1977, Dutch Treaty Series 1978, 41, 42.

⁵⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, Dutch Treaty Series 1985, 69.

⁵⁸ International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, Dutch Treaty Series 2008, 173. This Convention has been signed by 88 states and ratified by 25 states, including the Netherlands. It entered into force for the Kingdom of the Netherlands on 22 April 2011.

⁵⁹ In any event if such deprivation of liberty is not acknowledged or the whereabouts of the disappeared person are concealed. The text of article 2 reads as follows: 'For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting

with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.'

⁶⁰ 'Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.' See: Judgment of the Belgian Court of Cassation in the *Sharon* case, 12 February 2003 : '... *l'immunité de juridiction est exclue en cas de poursuite devant les juridictions identifiées à l'article VI précité mais ne l'est pas lorsque la personne accusée est traduite devant les tribunaux d'un Etat tiers s'attribuant une compétence que le droit international conventionnel ne prévoit pas*'; see www.debriefing.org/30314.html.

⁶¹ See n. 56; articles 49, 50, 129, 146.

⁶² Article 5 reads as follows: '1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (i) when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (ii) when the alleged offender is a national of that State; (iii) when the victim was a national of that State if that State considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.'

⁶³ 'Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance: (a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) when the alleged offender is one of its nationals; (c) when the disappeared person is one of its nationals and the State Party considers it appropriate.'

⁶⁴ 'The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.'

⁶⁵ However, it seems logical that this jurisdiction should be extended to cases of torture that are committed outside the territory of the forum state and in which officials of that state are involved.

⁶⁶ Akande/Shah, n. 15, p. 835: 'There is no obligation on third states to provide a civil remedy.' See also Jones, n. 27, para. 34 (Lord Bingham) and M. Nowak and E. McArthur, *The United Nations Convention Against Torture*, Oxford (2008) pp. 492-502.

⁶⁷ Paragraph 4: 'Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.' See also paragraph 5: 'The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) restitution; (b) rehabilitation; (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition.'

⁶⁸ As regards the Genocide Convention see H. Abtahi and P. Webb, *The Genocide Convention. The Travaux Préparatoires*; Leiden 2008. The preparatory acts of the Geneva Conventions can be found at the Federal Research Division, Military Legal Resources of the US Library of Congress; see www.loc.gov/rr/frd/MilitaryLaw/RC-Fin-Rec_Dipl-Conf-1949.html. As regards the Convention against Torture see: United Nations Economic and Social Council Commission on Human Rights: 35th session (E/CN.4/L.1470 12 March 1979); 36th session (E/CN.4/1367 5 March 1980); 37th session (E/CN.4/L.1567 24 February 1981); 38th session (E/CN.4/1982/L.40 5 March 1982); 39th session (E/CN.4/1983/63 25 March 1983). J.H. Burgers and H. Danelius *The United Nations Convention against Torture*, Dordrecht 1988; Nowak/McArthur, n. 55. As regards the Convention for the Protection of All Persons from Enforced Disappearance, see: E/CN.4Sub.2/RES/1998/25; E/CN.4/Sub.2/ 1998/19; E/CN.4/2002/71; E/CN.4/2004/59; E/CN.4/2004/WG.22/WP.1; E/CN.4/2004/WG.22/WP.2; E/CN.4/2005/66; E/CN.4/2005/WG.22/WP1; E/CN.4/2006/57.

⁶⁹ See, for example, Lord Browne-Wilkinson in *Pinochet III*, n. 43: '[...] the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have been frustrated. In my judgement all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.'

⁷⁰ This trend applies to all states in the case of the tribunals established by the UN Security Council and references in other respects to the International Criminal Court, whereas in the case of the International Criminal Court and other tribunals established by treaty, this applies only between the states that are parties to the convention under which the relevant tribunal is established or on the basis of customary international law.

⁷¹ The statutes of the Yugoslavia and Rwanda Tribunals (Resolutions 808 (1993), 22 February 1993 and 955 (1994), 8 November 1994, of the UN Security Council (Dutch Treaty Series 1993, 168 and 1994, 277) include, for example, the rule (in articles 7(2) and 6(2) respectively) that the official position of any accused person shall not relieve such person of criminal responsibility. Although this rule does not make any explicit statement about a possible limitation of immunity, it does confirm that holding a (high-ranking) government post does not confer impunity from the international crimes defined in the statutes.

⁷² See n. 4; article 1 of the Statute reads: 'An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be *complementary to national criminal jurisdictions*. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.' (italics added). Articles 5-8 describe the international crimes in question.

⁷³ House of Representatives 2001-2002 28337 no. 3, p. 2: 'Although this is not expressly regulated in the Statute, a majority of states (including the Kingdom of the Netherlands) have always assumed that it follows from the complementarity principle that the states parties to the Statute are obliged to ensure that the offences subject to the jurisdiction of the International Criminal Court are made criminal offences in their national legislation and also to establish extraterritorial, universal jurisdiction that enables their national criminal courts to try such offences even where committed abroad by non-nationals.'

⁷⁴ See also the IDI's Final Report, n. 21, para. 19.

⁷⁵ See n. 3.

⁷⁶ This question is: 'What is the scope of the immunity from criminal jurisdiction of foreign heads of state, heads of government and ministers of foreign affairs under international law?'

⁷⁷ See n. 14, para. 53.

⁷⁸ See n. 14, para. 54.

⁷⁹ See n. 14; para. 61.

⁸⁰ See also, for example, article of the IDI's 2001 Resolution, n. 21: 'When in the territory of a foreign State, the person of the Head of State is inviolable. While there, he or she may not be placed under any form or arrest or detention. The Head of State shall be treated by the authorities with due respect and all reasonable steps shall be taken to prevent any infringement of his or her person, liberty, dignity.' A. Watts, *The legal position in International Law of Heads of States, Heads of Governments, and Foreign Ministers*, Académie de Droit International de la Haye, *Recueil des cours*; 1994/III/247, (1995) p. 52; J.P. A. François, *Grondlijnen van het volkenrecht*, Zwolle (1954) p. 264. The French *Cour de Cassation* confirmed the personal immunity of Gaddafi, 13 March 2001, *International Law Reports* vol. 125 p. 508. As regards this judgment see S. Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation*, *European Journal of International Law* Vol. 12 no. 3, pp. 595-612.

⁸¹ See n. 22, para. 170.

⁸² Kolodkin I, n. 1, paras. 112-113; Akande/Shah, n. 15, pp. 824/25.

⁸³ See n. 14; para. 53.

⁸⁴ See, for example, the dissenting opinion of Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant* case, n. 14; p. 139, para. 1; Jan Wouters and Leen De Smet, *The ICJ's Judgment in the Case Concerning the Arrest Warrant of 11 April 2000: some Critical Observations* in *Yearbook of International Humanitarian Law*, H. Fischer, A. McDonald, eds., vol. 4 (2001), p. 373 ff., para. 2.1.1; Watts, n. 80, pp. 108/109; Akande/Shah, n. 15, pp. 820/21.

⁸⁵ See, for example, M. Ruffert, 48 *Netherlands International Law Review* (2001) p. 171 pp. 180-181: 'As far as a state's agents other than heads of state are concerned, there is few beyond functional reflections (*sic*) that justify their immunity.'

⁸⁶ See, for example, Kolodkin I, n. 1, para. 116 and footnote 231. See also article 21 of the Convention on Special Missions, n. 92.

⁸⁷ According to the IDI's Final Report, n. 18, para. 48, the International Court of Justice in the *Mutual Assistance* case, n. 19, indicated 'a general unwillingness to extend personal immunities too widely.'

⁸⁸ See, for example, the IDI's Final Report, n. 21, para. 47: 'The members of the Commission were of the view that the immunities of members of government, other than heads of State and heads of government, [are] recognized by international law to apply to such persons when on an official mission in the receiving State.' See also Akande/Shah, n. 15, pp. 822/23.

⁸⁹ See n. 1; para. 68: 'Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such on the territory of Belgium (on "official visits"). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap.'

⁹⁰ See *Kilroy v. Windsor*, n. 31 and the cases referred to in this judgment; the *Tabatabai* case, *Neue Juristische Wochenschrift* (NJW) 1984, Heft 36 p. 2048, in which the official character of a visit was evidently established in the course of the legal proceedings. The criminal chamber of the *Bundesgerichtshof* granted the claim to immunity. See also Akande/Shah, n. 15, pp. 822/23.

⁹¹ See section 4.4.2; see also *International Institutional Law*, H.G. Schermers and N.M. Blokker, Nijhoff, The Hague, 3rd impression, paras. 327 ff, para. 331: 'The members of a delegation enjoy full immunity from the criminal jurisdiction of the host state.'

⁹² New York, 8 December 1969, United Nations Treaty Series vol. 1400 No. 1-23431.

⁹³ The CAVV prefers the more general term 'official mission' to 'special mission'. The Convention uses the latter term to indicate that such missions differ from permanent missions (i.e. embassies and consulates).

⁹⁴ See the *Tabatabai* case, n. 90, which describes the views of German international law experts who disagree, within the meaning of this section, on the customary law status of what was then still the draft convention. The German Federal Supreme Court then held as follows: '*Auf die nach alledem zweifelhafte Frage der gewohnheitsrechtlichen Geltung der Konvention kommt es indes nicht entscheidend an [...]. Denn es steht fest, daß es jedenfalls – unabhängig von dem Konventionsentwurf – eine von der Staatenpraxis mit Rechtsüberzeugung getragene gewohnheitsrechtliche Regel gibt, wonach es möglich ist, von dem Entsendestaat mit einer besonderen politischen Aufgabe ausgestatteten ad-hoc-Botschaftern durch Einzelabsprache mit dem Empfangsstaat über diese Aufgabe und über ihren Status Immunität zu verleihen und sie auf diese Weise insoweit den – völkervertragsrechtlich geschützten – Mitgliedern der ständigen Missionen der Staaten gleichzustellen.*'

⁹⁵ In its final commentary on article 29 (personal inviolability) the ILC noted as follows: 'The Commission considered that [...] personal inviolability should, by its very nature, be deemed to be indivisible. The Commission therefore decided to follow article 29 of the Vienna Convention on Diplomatic Relations, which makes no distinction between proceedings instituted against a person enjoying inviolability on account of acts committed by him in the exercise of his official functions and proceedings instituted against him on account of acts committed in his private capacity.' Report of the Commission to the General Assembly, *Yearbook of the International Law Commission*, 1967, Vol. II, p. 361.

⁹⁶ 'It is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members.', n. 95, p. 358.

⁹⁷ Naturally, this immunity does not apply if the International Criminal Court requests extradition (see section 3.5).

⁹⁸ *Yearbook of the International Law Commission*, 1967 Vol II p. 41; A/CN.4/194.

⁹⁹ See the *Rainbow Warrior* case, *International Legal Materials* vol. 26 (1987) p. 1346. The *Abu Omar* case; Tribunale Ordinario di Milano in composizione monocratica Sezione 4 Penale 4/11/2009; see www.penalecontemporaneo.it.

¹⁰⁰ See articles 8-10, n. 92; for example, the participation of persons with the nationality of a state other than the sending state is expressly permitted.

¹⁰¹ On the basis of these findings, full immunity should be accorded, for example, to W, who is of Indonesian nationality and, as a former minister of foreign affairs, enjoyed only functional immunity, but who, as an adviser to the Indonesian president, paid an official visit to the Netherlands. See judgment of The Hague District Court (*Rechtbank*) of 24 November 2010, LJN: 380820 / KG ZA 10-1453; www.rechtspraak.nl.

¹⁰² See the (British) State Immunity Act 1978, Section 20: 'Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to: (a) a sovereign or

other head of State; (b) members of his family forming part of his household; and (c) his private servants, as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.’ (www.legislation.gov.uk/ukpga/1978/33?view=extent. See also *Oppenheim’s International Law*, Volume 1, edited by Sir Robert Jennings and Sir Arthur Watts, London 1996, para. 452, about the retinue of a head of state, which is deemed to include family members: ‘It is difficult to see why a head of State abroad should in this matter be in an inferior position to a diplomatic envoy.’ (Under article 37 of the Vienna Convention on Diplomatic Relations members of the family of a diplomatic agent forming part of his household enjoy, in principle, the same immunities as the agent himself (see n. 110)).

¹⁰³ On this last point see *Oppenheim*, n. 102; para. 453: ‘It is probably [...] necessary to take special account of the position of those members of a Head of State’s family [...] who are in their own right engaged in activities on behalf of their state.’ *Oppenheim* also mentions heirs to the throne in this connection. On this point see also *Kilroy v. Windsor*, n. 31.

¹⁰⁴ Article 11, see n. 16.

¹⁰⁵ See section 3.3.

¹⁰⁶ See n. 22, para. 196: ‘At no stage have the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed this Court, been informed by the Government of Djibouti that the acts complained of by France were its own acts, and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out. The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.’

¹⁰⁷ See section 3.3.

¹⁰⁸ Modernisation of the Judicial System (Evaluation) Act (*Evaluatiewet modernisering rechterlijke organisatie*), Parliamentary Papers 32 021.

¹⁰⁹ For example, agreements on the status of armed forces in the territory of other states.

¹¹⁰ 18 April 1961; Dutch Treaty Series 1962, 101.

¹¹¹ For the position concerning family members of embassy staff (members ‘forming part of his household’) see article 37 of the Convention.

¹¹² Under the Vienna Convention on Consular Relations (24 April 1963; Dutch Treaty Series 1965, 40) consular officials enjoy only functional immunity. Article 43, paragraph 1 of this Convention reads: ‘Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions.’

¹¹³ See, for example, the Convention on the Privileges and Immunities of the United Nations, 13 February 1946, Bulletin of Acts and Decrees 1948, 224 (article 4) and the Headquarters Agreement between the International Criminal Court and the Host State, 7 June 2007, Dutch Treaty Series 2007, 125 (article 21).

¹¹⁴ www.om.nl.

Annexe 1

Professor dr. M. Kamminga
Chair of the Advisory Committee on Issues of Public International Law
P.O. Box 20061
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Date: December 2009

Re: Request for advice on the immunity of foreign state officials

Questions about the exercise of criminal jurisdiction by the Netherlands in relation to foreign state officials are becoming increasingly common in practice. This is partly because of the efforts to combat impunity for serious international crimes. Although immunity need not result in impunity, immunity (often temporary) limits the scope for the criminal prosecution of foreign officials by the Netherlands.

Under customary international law various categories of foreign officials enjoy immunity from the criminal jurisdiction of foreign states, namely incumbent heads of state, heads of government and ministers of foreign affairs. The immunity of these categories of foreign officials before Dutch courts in respect of serious international crimes is laid down in the International Crimes Act (WIM). However, the precise scope of this immunity could be clarified. For example, the question arises of what aspects of the criminal process are affected by this immunity. There is also the issue of the scope of immunity from criminal jurisdiction after these officials cease to hold office. Another question is how immunity from criminal jurisdiction relates to the cooperation by the Netherlands with international criminal tribunals.

In addition, it may be asked whether other incumbent foreign state officials – such as vice presidents, junior foreign ministers and defence ministers – also enjoy immunity. The International Crimes Act allows scope for this where it refers to exclusion of prosecution of ‘other persons insofar as their immunity is recognised under international law’ (section 16 (a)) and to ‘persons who have immunity under any Convention applicable to the Netherlands’ within the Kingdom (section 16 (b)).

The question of the immunity of foreign state officials from criminal jurisdiction is currently being studied by the International Law Commission. However, it is not expected that this study will be completed in the near future.

Given the various situations with which the Netherlands has been confronted in the recent past, it is desirable to clarify this doctrine of international law. Given the expertise of the CAVV, I consider it very desirable to receive the advice of your Committee concerning the immunity from criminal jurisdiction of foreign officials. I should be grateful if you would take the following questions as the basis for your report:

- 1) What is the scope of the immunity from criminal jurisdiction of foreign heads of state, heads of government and ministers of foreign affairs under international law?
- 2) Are there other foreign state officials, besides heads of state, heads of government and ministers of foreign affairs, who enjoy immunity from (criminal) jurisdiction? Is it possible to formulate criteria to this end? What would be the scope of this immunity?
- 3) Do these persons also enjoy immunity from administrative and civil jurisdiction?

I should appreciate receiving your advisory report before 1 August 2010.
Maxime Verhagen
Minister of Foreign Affairs

Annexe 2

This advisory report was drawn up by the following members of the Advisory Committee on Issues of Public International Law:

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Annexe 3

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