

# **Government response to the advisory report of the Advisory Committee on Issues of Public International Law (CAVV) entitled 'Challenges in prosecuting the crime of aggression: jurisdiction and immunities'**

## **1. General**

On September 12 2022, the Advisory Committee on Issues of Public International Law (CAVV) presented me with its advisory report Challenges in prosecuting the crime of aggression: jurisdiction and immunities (annex 1). The government has taken note of this advisory report with appreciation.

The continued aggression of the Russian Federation against Ukraine and the related international debate on the establishment of an aggression tribunal meant that more time than usual was involved in drawing up the government's response to this advisory report.

This aggression constitutes one of the gravest breaches of international law in Europe since the Second World War. The world is confronted by the consequences of the Russian invasion on a daily basis: the many deaths, millions of displaced civilians, large-scale destruction of civilian infrastructure, child abductions and the occupation and annexation of Ukrainian territory.

It is of great importance that those who commit or are suspected of committing these violations of international law are held to account. The Netherlands is committed to the fight against impunity for all international crimes, including the crime of aggression.

The CAVV supports the leading role played by the Netherlands with regard to the prosecution of international crimes in general. For this reason, and in view of specific initiatives relating to the Russian invasion of Ukraine such as the Ukraine Accountability Conference, the CAVV decided – of its own accord – to publish an advisory report as a way of contributing to discussions on prosecuting the crime of aggression. The advisory report focuses specifically on the issues of jurisdiction and immunities. The following questions are central to this report:

1. Who can exercise jurisdiction over the crime of aggression?
2. To what extent does the group of persons who fall within the leadership criterion for commission of the crime of aggression overlap with the group of persons who can claim personal immunity?
  - a. Which persons meet the leadership criterion?
  - b. Besides heads of state, heads of government and ministers of foreign affairs, are there other high-ranking state officials who can claim personal immunity?
3. Does functional immunity extend to the crime of aggression?
4. Are immunities also applicable before international tribunals?

## **2. Key elements of the CAVV advisory report**

### 2.1 Jurisdiction

*Question 1: Who can exercise jurisdiction over the crime of aggression?*

The CAVV explains that international law defines the limits within which states can criminalise and prosecute certain acts. The principle of territoriality is the starting point: states in whose territory crimes are committed have jurisdiction over them and may prosecute those suspected of them. In certain cases, a state can establish jurisdiction over crimes committed outside its territory, for example when the perpetrator or victim is a national of the state concerned, or when the national, economic or financial security of the state is at stake. Many states also establish jurisdiction over international crimes on the basis of the universality principle in view of the shared interest of the international community in prosecuting such crimes. This concerns jurisdiction over international crimes committed abroad by foreign perpetrators and against foreign victims. Whether a state can actually prosecute on this basis ultimately also depends on national law.

Although the CAVV considers that the crime of aggression is certainly an international crime, it points out that there is some debate as to how the grounds for jurisdiction described above apply

to it. The CAVV refers to the position taken by the International Law Commission (ILC) in 1996 that only the aggressor state itself can exercise jurisdiction over this crime in view of the special political dimension of aggression.<sup>1</sup> The CAVV notes that the ILC reiterated this position in 2022. Moreover, the CAVV mentions that since the jurisdiction of the International Criminal Court (ICC) over the crime of aggression is more limited than over other international crimes, this reinforces the notion that other rules apply to the exercise of jurisdiction over this particular international crime.

The CAVV notes that there are three views on the question of who can exercise jurisdiction over the crime of aggression. The ILC takes the first view by stating that only the aggressor state itself can exercise jurisdiction over this crime. The CAVV also mentions the second view, which expresses support for a broader jurisdiction over the crime of aggression, under which the victim state is also able to exercise jurisdiction over the crime. The third view assumes an even broader jurisdiction based on application of the principle of universality. The CAVV considers this third view to be consistent with international law, partly because it would ensure that the exercise of jurisdiction is aligned for all international crimes.

The CAVV notes that there is no consistent and uniform state practice to show that states accept the principle that the crime of aggression can be prosecuted and tried by states other than the aggressor state. According to the CAVV, however, the fact that a large number of (mainly Western) states appear to support the establishment of an ad hoc aggression tribunal in connection with Russia's invasion of Ukraine implies that these states take the position that Ukraine has jurisdiction on the basis of the territoriality principle as the victim state. There is thus international support for this view, which means, according to the CAVV, that Ukraine may, if it wishes, delegate this jurisdiction to an international tribunal. The CAVV believes that this could lead to a customary law norm that permits domestic jurisdiction over aggression in various scenarios. The CAVV views such a development as understandable, because it would ensure that the exercise of jurisdiction is put on the same footing for all international crimes, which, like aggression, have a marked political dimension. The CAVV considers it important to ensure that the position currently taken on prosecuting those responsible for the aggression committed against Ukraine is subsequently applied consistently.

## 2.2 Immunity

*Question 2: To what extent does the group of persons who meet the leadership criterion for commission of the crime of aggression overlap with the group of persons who can claim personal immunity?*

- a. *Which persons meet the leadership criterion?*
- b. *Besides heads of state, heads of government and ministers of foreign affairs, are there other high-ranking state officials who can claim personal immunity?*

The CAVV acknowledges that the crime of aggression is a leadership crime. According to the CAVV, the leadership criterion as laid down in the Rome Statute should be taken as the starting point, because this was the wording agreed upon following extensive negotiations between states. It follows that the group of persons who can be held criminally responsible for aggression is limited. Hence, only those persons in a position effectively to exercise control over or to direct the political or military action of a state can be prosecuted for this crime.<sup>2</sup> However, in the CAVV's view, it is not yet fully clear which persons meet the leadership criterion. The CAVV notes that the following individuals in any event meet the leadership criterion: heads of state, heads of government, ministers of foreign affairs, ministers of defence, heads and deputy heads of a national security council and (senior) officers in the armed forces who are involved in planning, preparing and coordinating the act of aggression.

The CAVV confirms that of this group of individuals who fulfil the leadership criterion, only heads of state, heads of government and ministers of foreign affairs enjoy personal immunity (*ratione personae*) from the criminal jurisdiction of foreign states, including immunity from prosecution for

---

<sup>1</sup> ILC, 'Commentary to the Draft Code of Crimes against the Peace and Security of Mankind', in: Yearbook of the International Law Commission, 1996, Vol. II, Part Two, Article 8, commentary 14, p. 30.

<sup>2</sup> Cf. Article 8 *bis* of the Rome Statute.

international crimes, as long as they remain in office. Personal immunity means that these people cannot be taken to court or arrested abroad for official or private acts, regardless of the nature of their stay. Other persons who meet the leadership criterion do not enjoy personal immunity.

*Question 3. Does functional immunity extend to the crime of aggression?*

In principle, all foreign officials enjoy functional immunity (or immunity *ratione materiae*) from being prosecuted or tried by third states. This means that they cannot be prosecuted – without the consent of their home state – for acts they have performed in an official capacity. This rule also ensures that officials, even when they are no longer in office, cannot be subjected to the jurisdiction of another state or summoned before a foreign court on account of government actions that are considered harmful or unlawful in the country concerned.

The CAVV notes that in international legal practice there is no clear-cut answer to the question of whether there is an exception to functional immunity for international crimes, including the crime of aggression. Although, in its opinion, it is impossible to say with any certainty what the international law is on this point, the CAVV does consider that not recognising functional immunity for international crimes is currently justifiable as either an application of international law or contributing to a legal development that is already well advanced.<sup>3</sup> The CAVV (unlike the ILC) does not see the logic of distinguishing between the crime of aggression and other international crimes.

*Question 4. Are immunities also applicable before international tribunals?*

The CAVV points out that the UN Security Council can in any event set aside immunity on the basis of Chapter VII of the UN Charter when establishing a new ad hoc tribunal, including immunity with regard to the crime of aggression. After all, resolutions adopted under Chapter VII can impose binding obligations on members of the UN. Obligations under the Charter take precedence over other rules of international law.

The CAVV notes that the International Criminal Court was established by treaty and not on the basis of Chapter VII. However, this does not prevent states that are party to the Rome Statute from agreeing among themselves that their officials do not have personal or functional immunity before the International Criminal Court. Moreover, in the *Al-Bashir* case the International Criminal Court held that immunity does not prevent arrest and surrender, regardless of whether the person concerned is a head of state of a party to the Statute and regardless of how a case has been brought before the International Criminal Court (through a state party, referral by the UN Security Council or ad hoc recognition of the International Criminal Court's jurisdiction).<sup>4</sup> The International Criminal Court's Appeals Chamber held 'that there is neither State practice nor *opinio juris* that would support the existence of head of state immunity under customary law vis-à-vis an international court.'<sup>5</sup> According to the International Criminal Court, the legitimation for this is that international courts act on behalf of the international community as a whole. The CAVV describes these pronouncements as controversial because international law does not permit a group of states to impose obligations on third states without the latter's consent. It emphasises that if the Netherlands nonetheless wishes to support a legal development in which personal immunities do not apply before certain international tribunals, it should in any event advocate a distinctive and restrictive definition of the term 'international tribunal'. Without a clear definition of the characteristics that make a tribunal sufficiently 'international' to warrant not recognising personal

---

<sup>3</sup> United Nations, *Draft Articles on Immunity of State officials from foreign criminal jurisdiction*, 2017, Report of the International Law Commission on the work of its sixty-ninth session, paragraphs 74 and 122, <https://legal.un.org/ilc/reports/2017/english/chp7.pdf>.

<sup>4</sup> See also the judgment of the Appeals Chamber in the case brought against Jordan for its failure to execute an arrest warrant: 'In the appeal brought by the Hashemite Kingdom of Jordan (Jordan), the Appeals Chamber of the International Criminal Court (ICC or Court) decided unanimously to confirm the decision of ICC Pre-Trial Chamber II (Pre-Trial Chamber), to the extent that it found that Jordan, a State Party to the ICC Rome Statute since 2002, had failed to comply with its obligations by not arresting Mr Omar Al-Bashir (at all material times the President of the Republic of the Sudan (Sudan)) and surrendering him to the ICC while he was on Jordanian territory attending the League of Arab States' Summit on 29 March 2017.'

<sup>5</sup> International Criminal Court, 6 May 2019, Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2, paragraph 113.

immunity, the reasoning of the Special Court and the International Criminal Court leaves individuals entitled to claim personal immunity in a vulnerable position. The CAVV also observes that it is important to realise that, in the event of such a development, Dutch officials too would not be entitled to personal immunity before an international tribunal.

### **3. Government response to the advisory report**

#### 3.1 Introduction

The development of international law to treat aggression as a criminal offence has its basis in 1945, at the time of the establishment of the Tokyo and Nuremberg Military Tribunals. Both these tribunals, which were established in the aftermath of the Second World War, recognised the definition of crimes against peace, including the crime of waging a war of aggression. Subsequently, crimes against peace tended to recede into the background due to the increasingly prominent position of the individual under international law, the development of other international crimes and debates about the scope of the prohibition of the use of force after the entry into force of the UN Charter and about how the crime of aggression should be defined since then.

Resolution 3314 of the United Nations General Assembly (UNGA),<sup>6</sup> adopted in 1974, has played a major role in shaping the present definition of aggression. However, the definition of aggression in that resolution focuses mainly on state responsibility and does not deal with individual criminal responsibility. The principal aim of the definition was to assist the UN Security Council in determining what constitutes an act of aggression.

The next important reference point in the development of the crime of aggression was the entry into force of the Rome Statute. The crime of aggression was included in the list of four international crimes over which the International Criminal Court exercises jurisdiction. In theory, the inclusion of aggression in the list of crimes conferred jurisdiction on the International Criminal Court. However, in order for the International Criminal Court to be able to exercise this jurisdiction in practice, it was necessary to adopt a definition of the specific crime as well as the conditions on which the jurisdiction could be exercised. The 2010 Kampala amendments were intended to fill this gap in the Rome Statute by adding an extra article – article 8 *bis* – defining the crime of aggression. Also added were articles 15 *bis* and 15 *ter*, which describe the International Criminal Court's jurisdiction over the crime in more detail. The Netherlands has ratified these amendments and amended the International Crimes Act (*Wet internationale misdrijven*) accordingly.

#### 3.2 Jurisdiction

The government endorses the CAVV's position that there are several grounds for the exercise of jurisdiction over international crimes, including the crime of aggression. This position is already reflected in Dutch legislation, which makes no distinction between the various international crimes as regards jurisdiction. The Netherlands has established jurisdiction on the basis of the territoriality principle, the nationality principle and the universality principle over all international crimes that have been recognised as criminal offences in Dutch legislation. The last of these grounds for exercising jurisdiction over the crime of aggression is, as for other international crimes specified in the International Crimes Act, limited to those cases in which the suspect is on Dutch territory.

The government also endorses the importance of working, in accordance with current policy, to amend the International Criminal Court's jurisdictional regime for the crime of aggression, thereby bringing it into line with the regime applicable to other international crimes. It should be noted that, from the outset of the negotiations on the Rome Statute, the Netherlands has worked to ensure that the International Criminal Court can exercise jurisdiction over the crime of aggression in the same manner as it exercises jurisdiction over the other international crimes (genocide, crimes against humanity and war crimes).

At present, the International Criminal Court cannot exercise jurisdiction over the crime of aggression in connection with the invasion of Ukraine because Russia is not a party to the Rome

---

<sup>6</sup> United Nations General Assembly Resolution 3314 (annex), 14 December 1974, <http://www.un.org/documents/ga/res/29/ares29.htm>.

Statute and the Rome Statute Amendments on the crime of aggression. Furthermore, a referral by the UN Security Council seems out of the question. As a gap therefore exists with regard to the situation in Ukraine, the Netherlands is working to explore other ways of prosecuting the crime of aggression, for example through a special aggression tribunal.

### 3.3 Immunity

#### *3.3.1 Personal immunity before national courts*

The government endorses the CAVV's position that there is no exception to the principle that personal immunity cannot be set aside where a prosecution is brought before national courts in third states if the aggressor state has not consented to this. In such a case, the personal immunity of the incumbent head of state, head of government or foreign minister (the *troika*) should be respected as long as they hold office. However, as the International Court of Justice held as long ago as 2002<sup>7</sup> and the CAVV has emphasised, immunity is not the same as impunity, as the immunity of these individuals does not apply in their own country and also expires as soon as they are no longer in office or when the state in which they have held any of these positions waives this immunity.

#### *3.3.2 Functional immunity before national courts*

In line with the CAVV's advisory report, the government's position remains that functional immunities do not automatically prevent criminal prosecution at national level for international crimes. This is also in line with what is said on this subject in the Explanatory Memorandum to the International Crimes Act. It should be noted, however, that the final decision on this naturally lies with the courts.

#### *3.3.3 Immunity before international tribunals*

The government would emphasise that the judgment of the International Criminal Court in the *Al Bashir* case interprets the Rome Statute. According to this interpretation, states that are party to the Statute have an obligation to cooperate in the arrest of suspects and their surrender to the International Criminal Court. The International Criminal Court considers that this interpretation is therefore a given for states parties. According to the International Criminal Court, this obligation would also apply where a request is made for the arrest and surrender of a head of state, head of government or minister of foreign affairs of a state that is not a party to the Statute.

Although the government acknowledges that this interpretation of the Statute by the International Criminal Court entails obligations towards the Court, it notes that this could give rise to a situation in which a state is subject to conflicting obligations under international law. This has already been recognised in the Explanatory Memorandum to the International Crimes Act, where it was pointed out that in such a case it will initially be up to the International Criminal Court to form an opinion on possible immunity and examine whether it can maintain its request to the state concerned.

The government recognises that the legal development initiated by the judgment of the International Criminal Court in the *Al Bashir* case is controversial, and it takes the position that if personal immunity is to be set aside before tribunals other than the International Criminal Court this must have sufficient support from the international community. What makes a tribunal sufficiently 'international' that it need not recognise personal immunity is still a matter of debate.

The government also endorses the CAVV's position that functional immunity need not necessarily be an obstacle to the prosecution of the crime of aggression by an international tribunal, in line with the direction in which the law is already developing, as described by the CAVV. The government would observe that there is greater support among states for restricting functional immunity before an international tribunal than before national courts. The government agrees with the CAVV that when considering the idea of establishing a tribunal to try nationals of a state that does not cooperate in the prosecution of international crimes, including the crime of aggression,

---

<sup>7</sup> *Arrest Warrant case*, 11 April 2000 (*Democratic Republic of the Congo v. Belgium*).

support should be sought from the largest possible group of states to legitimise the restriction of functional immunity.

#### **4. Conclusion**

The government is grateful to the CAVV for the advisory report. The report helps to clarify the framework within which Dutch efforts in connection with the prosecution and trial of the crime of aggression can be made, and hence contributes to an important development in international law. For example, the position that there are several grounds for exercising jurisdiction over the crime of aggression provides a basis for further discussion about the exercise of that jurisdiction.

At the same time, the report provides guidance – in line with the existing Dutch position – for the prosecution and trial of suspects of the crime of aggression who enjoy immunity.