



## **Challenges in prosecuting the crime of aggression: jurisdiction and immunities**

*CAVV Advisory report no. 40 – conclusion and advice  
(provisional translation)*

### ***Proprio motu* advisory report**

1. The Advisory Committee on Issues of Public International Law (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 has decided – of its own accord – to publish an advisory report as a way of contributing to discussions on prosecuting the crime of aggression. The report focuses specifically on the issues of jurisdiction and immunities.
2. In this report, the CAVV also draws attention to the risk of selective application and emphasises that the Dutch government must be prepared (i) to accept that rules and interpretations developed for the present situation will then become generally applicable, and even (ii) to promote this more general application, for the sake of the universality and consistency of international law.

### **Jurisdiction**

*Who can exercise jurisdiction over the crime of aggression?*

3. There are two views on the question of who can exercise jurisdiction over the crime of aggression. According to the first view, only the aggressor state – in this case Russia – has jurisdiction. The other view is that there are several grounds for the exercise of domestic jurisdiction over aggression, including in any event the exercise of jurisdiction by the victim state on the basis of the territoriality principle.
4. The CAVV considers that the position that there are several grounds for the exercise of jurisdiction is understandable, particularly since this will align the exercise of jurisdiction over all international crimes.
5. However, it is important for this position to gain general acceptance. The Netherlands can help to promote such acceptance, notably (i) by confirming the Dutch position, as currently codified in the International Crimes Act (*Wet internationale misdrijven*), that it is possible to exercise different forms of jurisdiction (including universality) over the crime of aggression, and (ii) by working to amend the jurisdictional regime for



aggression of the International Criminal Court, thereby rendering it in line with the jurisdictional regime applicable to other crimes.

### **Leadership criterion and personal immunity**

*To what extent does the group of persons who can fulfil the leadership criterion for the crime of aggression overlap with the group of persons who can claim personal immunity?*

6. Aggression is a leadership crime, in other words only those in a position effectively to exercise control over or to direct the political or military action of a State can be tried for it. The following individuals can in any event be regarded as leaders: heads of government, heads of state, 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.
7. Of this group of individuals who fulfil the leadership criterion, only heads of state, heads of government and ministers of foreign affairs enjoy absolute personal immunity from the criminal jurisdiction of foreign states, including immunity from prosecution for international crimes, as long as they remain in office. This triumvirate 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.

### **Functional immunity**

*Does functional immunity extend to the crime of aggression?*

8. In principle, foreign officials enjoy functional immunity (or immunity *ratione materiae*). This means that they cannot be prosecuted for acts they have performed in an official capacity. This rule also ensures that Dutch officials, even when they are no longer in office, cannot be summoned before a foreign court on account of Dutch policy that is considered harmful or unlawful abroad. 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. The CAVV takes the view that not recognising functional immunity for international crimes is currently justifiable as either being consistent with international law or contributing to a legal development that already has strong momentum. The CAVV does not see the logic of distinguishing between the crime of aggression and other international crimes.



### **Immunity and international tribunals**

*Are immunities also applicable before international tribunals?*

9. As regards the question of whether a special exception to immunity applies before international tribunals, the CAVV interprets the case law of the International Court of Justice as meaning that an international tribunal that has been established without the involvement of the defendant's home state and lacks a basis under Chapter VII of the UN Charter must respect the personal immunity of heads of state, heads of government and ministers of foreign affairs.
10. If the Netherlands nonetheless wishes to back a legal development under which personal immunities do not apply before (a larger group of) international tribunals, in keeping with the view of the Special Court for Sierra Leone and the International Criminal Court, it will in any event be important to advocate a distinctive and restrictive definition of the term 'international tribunal'. It is important to note, incidentally, that in the event of such a development, officials in the Netherlands, in particular our prime minister and minister of foreign affairs, would also not be granted personal immunity before an international tribunal.
11. The restriction of functional immunity for international crimes before international courts can be inferred from the law that applies or is evolving with regard to national courts, as mentioned in point 8 above. Functional immunity is therefore not an obstacle to a trial for the crime of aggression before an international tribunal.