



**Advisory Committee
on Public International Law**

Challenges in prosecuting the crime of aggression: jurisdiction and immunities

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Introduction and background to this *proprio motu* advisory report

The Netherlands has traditionally played a leading role in the field of international justice, the pursuit of accountability and, more specifically, the prosecution of international crimes. The Netherlands is host to the main international courts, including the International Criminal Court (ICC), and has played a leading role with other states in promoting efforts to introduce a multilateral convention on mutual legal assistance and extradition for international crimes.¹

The Netherlands has also been active in response to the Russian aggression against Ukraine.² The Netherlands, together with the Office of the Prosecutor (OTP) of the International Criminal Court and the European Commission, hosted the Ministerial Ukraine Accountability Conference at the World Forum in The Hague on 14 July 2022. At the request of the International Criminal Court, the Royal Military and Border Police have assisted in the collection of evidence of war crimes in Ukraine. Another example of this involvement is that Attje Kuiken, the chair of the Permanent Committee on Foreign Affairs of the House of Representatives, is one of the signatories of the March 2022 ‘Statement by Foreign Affairs Committee Chairs Calling for the Creation of an International Criminal Tribunal into Vladimir Putin’s Criminal Conspiracy’.³ These initiatives are the result of a widely shared wish to bring to justice those responsible for the violence perpetrated by Russia against Ukraine.⁴ This includes a wish to prosecute Russia’s leaders specifically for the crime of aggression, namely their decision to wage a war of aggression. The prosecution of this crime is more complicated than that of other international crimes, such as war crimes for which lower-ranking state officials too can be prosecuted. This advisory report examines the prosecution of individuals for the crime of aggression and the challenges this entails.

Efforts to develop an accountability strategy for Ukraine, which Minister of Foreign Affairs Wopke Hoekstra has called for,⁵ must take as their starting point the principle that the International Criminal Court can now try those responsible for the genocide, crimes against humanity and war crimes committed by Russia, but not those responsible for the aggression that has been perpetrated. The ICC has jurisdiction over genocide, crimes against humanity and war crimes when the state in whose territory those crimes were committed accepts its jurisdiction (Article 12, paragraph 2 of the Rome Statute, also known as the Statute of the International Criminal Court). Ukraine is not a party to the Rome Statute, but made two declarations in 2014 and 2015 in accordance with Article 12, paragraph 3 of the Statute accepting the jurisdiction of the ICC over crimes committed in its territory since 21 November 2013. On 1 March 2022, a group of 39 states, including the Netherlands, referred the situation in Ukraine to the Prosecutor of the ICC in accordance with Articles 13, paragraph a and 14, paragraph 1 of the Statute. Since then, other countries have joined this referral. However, the ICC’s jurisdictional regime for the crime of aggression is unique and differs from the regime that is applicable to other crimes under the Rome Statute: the crime of aggression can be prosecuted only if the state responsible for the aggression is a party to the Statute and has also separately accepted the ICC’s jurisdiction over the crime of aggression⁶ or if the Security Council has referred the situation to the Prosecutor.⁷ As Russia is not a party to the Rome Statute and referral by the UN Security Council would meet with a Russian veto, it would be unrealistic to expect that the ICC could prosecute those responsible for Russia’s decision to engage in a war of aggression. This is perceived as a gap in the Rome Statute, even though, when the Statute was extended to include the crime of aggression, it was stated that the ICC should give priority to the prosecution of the other three crimes under its jurisdiction rather than to the prosecution of aggression.⁸

Various alternatives are currently being examined with a view to ensuring that the crime of aggression can still be prosecuted with regard to the situation in Ukraine. These alternatives are an ad hoc international tribunal,⁹ an ad hoc hybrid tribunal¹⁰ and a national tribunal (possibly having an international dimension).¹¹ The question in all these cases is on what basis jurisdiction is exercised and whether defendants can invoke *international immunity*.

As these questions about jurisdiction and immunity are central to the discussion on prosecuting the crime of aggression against Ukraine, and in view of the leading role played by the Netherlands in the prosecution of international crimes more generally, the CAVV has decided on its own initiative to publish this advisory report on the issues of jurisdiction and immunity, as a way of contributing to this discussion. On the basis of four questions formulated in the next section, the CAVV outlines in this advisory report the present state of international law, indicates what matters are currently controversial or unclear, identifies any gaps that may exist, and advises on the direction in which the law might possibly develop, while also considering the implications of such a development. In doing so, the CAVV also draws attention to the risk of selective application and emphasises that the Dutch government must be prepared to accept that rules and interpretations devised for the present situation will then become universally applicable, and even to promote this more general application for the sake of the universality and consistency of international law.



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Prosecuting the crime of aggression: four key questions about jurisdiction and immunity

The first step in prosecuting a crime is to determine jurisdiction: can jurisdiction be exercised over the person suspected of the crime? As explained in more detail below, the exercise of jurisdiction may be based on various grounds. States can establish and exercise jurisdiction on the basis of principles such as territoriality, nationality, protection and universality. An international tribunal can acquire jurisdiction either pursuant to a UN Security Council resolution establishing the tribunal or on the basis of a convention under which the States Parties delegate their jurisdiction to the tribunal.

However, there is debate as to whether and, if so, to what extent these grounds for jurisdiction also apply to the crime of aggression. As regards states, it is sometimes argued that only the aggressor state can exercise jurisdiction over persons suspected of the crime. Others consider that the state on whose territory the aggression has been perpetrated can also exercise jurisdiction. And yet others maintain that a principle such as protection or universality also applies to the crime of aggression.¹² In the case of international tribunals, the International Criminal Court has only limited jurisdiction over aggression, as explained above. And the very fact that there is uncertainty about the scope of domestic jurisdiction over aggression (see below) means that it is just as unclear whether states are capable of transferring this jurisdiction to a newly established tribunal.

There is also the issue of immunity: international law has various immunity rules that prevent the exercise of jurisdiction over foreign state officials without the consent of their home state. Two forms of immunity are relevant here. First, a limited number of high-ranking state officials, including in any event heads of state, heads of government

and ministers of foreign affairs, enjoy personal immunity, which is absolute and even applies to acts committed in a private capacity. They enjoy this immunity as long as they hold office. A much larger group of state officials, but including the high-ranking officials to whom reference has just been made, enjoy *functional* immunity, namely in so far as they act on behalf and for the account of the state. This immunity applies only to acts committed in an official capacity, but continues to apply even after the official leaves office for acts committed while in office.

The crime of aggression can be committed only by persons in a position effectively to exercise control over or to direct the political or military action of a state.¹³ It therefore constitutes what is known as a ‘leadership crime’ that is committed on behalf of the state. The leadership position of the perpetrator and the nature of the crime thus raise the question of whether personal and functional immunity could be an obstacle to prosecuting the crime of aggression in a court other than a court of the defendant’s home state. Personal immunity extends to international crimes,¹⁴ but the question is exactly what leadership positions are protected by this form of immunity and to what extent this immunity too is an obstacle to prosecution by an international court.¹⁵ The scope of functional immunity is also a matter of dispute. In particular, there is debate about whether this form of immunity extends to international crimes, and if so, precisely which international crimes.¹⁶

The issues of both jurisdiction and immunity still often receive insufficient attention in the discussions on how to prosecute those responsible for Russia’s aggression against Ukraine. The CAVV therefore considers it useful to draw attention to these issues and is submitting this advisory report



to the Minister of Foreign Affairs on its own initiative.¹⁷

Four questions are central to this advisory report:

1. Who can exercise jurisdiction over the crime of aggression?
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?
3. Does functional immunity extend to the crime of aggression?
4. Are immunities also applicable before international tribunals?

The advisory report briefly sets out below the most important aspects of international law relevant to each of these questions. The subject matter is complex and international law does not yet provide clear-cut answers to all the questions. International law must be respected when making choices about prosecuting the crime of aggression. It is also important to realise that certain choices and positions regarding the scope of immunity rules that may apply to the prosecution of the crime of aggression committed against Ukraine will also gain broader application. These choices and positions may possibly contribute to the further development of rules of international law that will apply to all states and state officials.

— Question 1:

Who can exercise jurisdiction over the crime of aggression?

International law defines the limits within which states can criminalise and prosecute certain acts. The principle of territoriality is the starting point: states may criminalise and prosecute offences committed in their territory. It is sufficient for one element of the crime to take place in the territory, for example the planning and initiation of the crime (subjective territoriality principle) or the execution and completion of the crime

(objective territoriality principle). In certain cases, jurisdiction may also be established over crimes committed abroad, namely when the perpetrator or victim is a national of the state of the forum, when the national, economic or financial security of the state is at stake, or when an international crime has been committed.¹⁸ Jurisdiction over international crimes committed abroad by foreign perpetrators and against foreign victims can be established on the basis of the universality principle: all states have a (shared) interest in prosecuting these acts prohibited by international law. Whether a particular state can actually prosecute a particular crime ultimately also depends on national law. International law serves as the basis, but the act concerned must be made a crime under national law as well. In the Netherlands, this is regulated in the International Crimes Act (*Wet internationale misdrijven*).¹⁹ Like many other states, the Netherlands imposes a significant constraint on the exercise of universal jurisdiction: prosecution on this basis can be instituted only if the defendant is physically present in Dutch territory.²⁰

Although the crime of aggression is undoubtedly an international crime, there is some debate as to whether the regular grounds for jurisdiction apply to it. The International Law Commission (ILC), for example, has argued that only the aggressor state itself can exercise jurisdiction over this crime in view of the special political dimension of aggression:

A court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a state. The determination by a national court of one State of the question of whether another State has committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet* [equals do not have authority over one another]. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.²¹



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The ILC reiterated this position in 2022.²² A similar position was also taken by the United States during the negotiations on including the crime of aggression in the ICC's Rome Statute.²³ As the ICC's jurisdiction over the crime of aggression is more limited than over other international crimes (it cannot exercise jurisdiction over aggression committed by a state that is not a party to the Statute²⁴), this reinforces the notion that other rules apply to this particular international crime. Moreover, the statement by the parties to the Statute that the inclusion of the crime of aggression in the Statute 'shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State',²⁵ appears to be a clear concession to those states that do not accept prosecution of aggression by a state other than the aggressor state. The argument has also been made in the literature that 'there is little empirical support for domestic prosecutions of the crime of aggression under any jurisdictional basis'.²⁶ Although 74 states have included the crime of aggression in their national law, only a relatively small number of them (about 18) allow prosecution of the crime on the basis of the principle of universality.²⁷ The other states establish jurisdiction on other grounds, including the territoriality²⁸ and the protective principle.²⁹ In most cases, domestic jurisdiction can be exercised only by the aggressor or victim state.³⁰ It is noteworthy that the Dutch International Crimes Act too provides for universal jurisdiction over aggression.³¹ To date, however, there have been few if any cases of national prosecution of aggression in practice, although Lithuania and Poland have recently opened investigations into Russian.³² There are also two known cases in which Ukraine has prosecuted aggression, although these did not employ the international definition of aggression (omitting, in particular, the leadership criterion).³³

Although aggression has been prosecuted at national level in only a limited number of cases, support for the legitimacy of such prosecutions in principle has been expressed in the literature. For example, one author has argued that not only the aggressor state but also the victim state can establish jurisdiction over the perpetrators of aggression as a form of self-help (although in

such a case jurisdiction cannot be transferred to an international tribunal).³⁴ Another author even advocates the legitimacy of universal jurisdiction.³⁵

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 by states other than the aggressor state. Given the difficulty with which the crime of aggression was introduced into the Rome Statute (an amendment that is currently supported by just over 40 states and is subject to restrictive conditions), it is also apparent that states even wished to allow prosecution by the ICC only if the aggressor state has consented to the exercise of jurisdiction. This is also consistent with the precedent of the Nuremberg Tribunal, which based its jurisdiction over aggression (then still known as a 'crime against the peace') on the transfer of jurisdiction by the Allied Powers that occupied Germany after the Second World War and thereby assumed the powers of the German aggressor state.³⁶

It follows that, in the absence of a Security Council resolution, states cannot simply transfer powers to a newly established international tribunal. Even the delegation of jurisdiction by Ukraine to such a tribunal might prove problematic if the ILC's view that only the aggressor state has jurisdiction were to hold sway.

However, a large number of (mainly Western) states appear to support the establishment of an ad hoc aggression tribunal. This implies that these states take the position that Ukraine has jurisdiction on the basis of the territoriality principle as the victim state. Ukraine may, if desired, delegate this jurisdiction to an international tribunal. Provided that any protest against this development is limited, a customary law norm that permits domestic jurisdiction over aggression in various scenarios may crystallise. The CAVV views such a development as understandable, because it would ensure that the exercise of jurisdiction is aligned for all international crimes, which, like aggression, have a marked political dimension. The Netherlands can help to promote acceptance of this development, notably by (i) confirming its position, as currently codified in the International



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Crimes Act, regarding the possibility of exercising different forms of jurisdiction (including universality) over the crime of aggression, and (ii) working to amend the jurisdictional regime of the International Criminal Court on this subject, thereby making it consistent with the regime applicable to other crimes.

The discussion about prosecuting those responsible for Russian aggression in Ukraine cannot ignore the differing views on jurisdiction. Applying different standards to different situations could provoke legitimate criticism that the states involved are seeking to bend international law to make possible what has hitherto been impossible. It is therefore important to ensure that the position currently taken on prosecuting those responsible for the aggression committed against Ukraine is subsequently applied consistently, and that the Netherlands also urges other states to adopt the same approach. It also follows that the Netherlands and the other states involved that are parties to the Rome Statute must be prepared to try to amend the ICC's jurisdictional regime on this point.

— Question 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?

— Question 2a:

Which persons fall within the leadership criterion?

Article 8 bis, paragraph 1 of the Rome Statute reads as follows:³⁷

For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

The phrase 'by a person in a position effectively to exercise control over or to direct the political or military action of a State' defines the

leadership criterion. By adopting this criterion, the authors of the Rome Statute deliberately limited the group of persons who can be held criminally responsible for the crime of aggression.³⁸ As the leadership criterion applies to all forms of responsibility, on the basis of Article 25, paragraph 3 *bis*, an accessory, too, can only be someone who meets that criterion.

The leadership criterion does not appear as such in the Charters of the Nuremberg and Tokyo Military Tribunals, despite the fact that the object of these tribunals, in a more general sense, was to try only major war criminals. The criterion applied by the national military tribunals that tried war criminals in the wake of the Nuremberg Tribunal on the basis of Control Council Law No. 10, namely the power to 'shape or influence policy', was broader than that currently laid down in the Rome Statute ('control or direct').³⁹ It is therefore debatable whether the definition contained in the Rome Statute fully corresponds on this point with the definition that exists under customary international law.⁴⁰

There is also debate about which persons exactly meet the criterion of the Rome Statute, in other words about precisely how the 'control or direct' criterion should be understood and interpreted. The criterion should in any event cover political leaders, including certain members of the government, and military leaders. The words 'in a position' indicate that persons who operate outside the formal leadership structures may also fall within the leadership criterion.⁴¹ The question of whether religious leaders and businesspeople can, in certain situations, also be regarded as leaders within the meaning of Article 8 *bis* of the Rome Statute is answered in different ways in the literature.⁴² However, unless a religious leader also holds a certain formal position in the administration or unless there is another very specific context, it is far from certain that such a person meets the strict leadership criterion. A more complicated question is whether members of parliament can meet the criterion, especially those who operate in systems in which parliamentary approval for the use of force or international deployment of the armed forces is required by law or custom. In the literature, this question is mainly answered in the negative,⁴³ but the final answer will depend on the circumstances of the case.



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Many states that have implemented the Rome Statute in their national law have formulated the leadership criterion in the same way as in Article 8 *bis*, paragraph 1 of the Statute. The Netherlands too has done this in section 8b of the International Crimes Act. However, not all states have adopted the leadership criterion for the forms of co-responsibility defined by the ICC in Article 25, paragraph 3 *bis*. Moreover, some states, such as Croatia, take a broader approach to the leadership criterion at national level.⁴⁴ Other states add additional forms of criminal responsibility, for example the crime of *inciting aggression*.⁴⁵ It should be noted that the provisions of Ukrainian law that criminalise aggression do not contain an explicit leadership criterion.⁴⁶ Other countries, such as Tajikistan, Uzbekistan and Kazakhstan, do not specify that criminal responsibility for aggression is limited to a particular group of leaders.⁴⁷ Nonetheless, the leadership criterion can still implicitly form part of the definition of the crime. Moreover, it has been argued that states that are parties to the Rome Statute are especially likely to interpret their national laws in the light of the Statute and contemporary developments.⁴⁸

The CAVV considers that the leadership criterion as laid down in the Rome Statute ('control or direct') 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. However, it is not yet fully clear which persons meet the leadership criterion. The drafters of the Rome Statute wished to limit the size of the group, while at the same time taking account of realities outside the formal structures. Moreover, military leaders are clearly not excluded as possible perpetrators of the crime of aggression. It should also be noted that, in so far as prosecution at national level is accepted, the circle of criminal responsibility at that level can be broadened if the leadership criterion does not have to be applied to the forms of co-responsibility. In any case, the following individuals could be subject to prosecution for the crime of aggression: 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.

The next question is which persons can claim personal immunity and to what extent that group is more limited than the group that can be held criminally responsible for aggression.

— Question 2b:

Besides heads of state, heads of government and ministers of foreign affairs, are there other high-ranking state officials who can claim personal immunity?

In the *Arrest Warrant* case, the International Court of Justice (ICJ) held that, like incumbent heads of state or heads of government, incumbent foreign ministers are inviolable abroad and enjoy absolute personal immunity from the criminal jurisdiction of foreign states, even where the prosecution concerns international crimes.⁴⁹ They cannot be tried or arrested abroad for official or private acts, regardless of the nature of their stay.

Following the *Arrest Warrant* case, the question has arisen of whether other high-ranking state officials are also covered by this far-reaching immunity rule. Relevant state practice is limited. According to a judge in the United Kingdom, the Israeli defence minister was entitled to claim the same immunity as the foreign minister. The judge explained this decision in the following terms: 'Although travel will not be on the same level as that of a Foreign Minister, it is a fact that many states maintain troops overseas and there are many United Nations missions to visit in which military issues do play a prominent role between certain States. It strikes me that the roles of defence and foreign policy are very much intertwined, in particular in the Middle East.'⁵⁰ A Swiss court too has concluded that the personal immunity of the *troika* extends to the incumbent defence minister.⁵¹ Another English judge has also held that the functions of the Chinese Minister of Commerce were comparable to those of the Foreign Minister and that he could therefore claim the same immunity.⁵²

However, the CAVV believes that there are good reasons not to apply the far-reaching immunity discussed in the *Arrest Warrant* case to holders of high office other than those mentioned by



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the ICJ.⁵³ Although they too can indeed play an important role in a state's international relations and frequently travel abroad for consultations with their foreign counterparts, a combination of their existing ad hoc diplomatic immunity during official trips⁵⁴ and functional immunity⁵⁵ is sufficient to enable them to perform their duties effectively.

It is important to note that in its judgment in the *Arrest Warrant* case the ICJ put forward two separate reasons for the immunity of the *troika*. First, it emphasised that immunity is motivated by the central role of these state officials in maintaining international relations with other states and the frequent international travel that this role entails. This is a consideration that does indeed apply to other high-ranking state officials as well. However, in addition, the ICJ stressed the representative nature of the functions of the three positions: '[...] 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 the State solely by virtue of his or her office. He or she does not have to present letters of credence.'⁵⁶

Since existing ad hoc diplomatic immunity and functional immunity are sufficient to ensure that heads of state, heads of government and ministers of foreign affairs can discharge their duties effectively, their far-reaching immunity seems to be based mainly on the representative character of the offices they hold: these three state officials are the embodiment of the state in relations with other states and represent the state at all times, not just during official travel abroad.

What is in any event clear is that not all individuals who may be held accountable for the crime of aggression can claim personal immunity. Although aggression is admittedly a leadership crime, as explained above, the group of people who fall within the leadership criterion, although limited, is much broader than the three officeholders mentioned by the International Court of Justice, namely the incumbent foreign minister, incumbent head of state and incumbent head of government.

— Question 3:

Does functional immunity extend to the crime of aggression?

In principle, foreign state officials enjoy functional immunity (immunity *ratione materiae*). This means that they cannot be prosecuted for acts they have performed in an official capacity. This rule is interpreted in two ways. Some see it as an independent principle that bars courts from holding foreign state officials individually responsible for acts they have performed as an extension of the state:⁵⁷ it is up to the home state to determine what its officials can and cannot do in office, and it is up to the courts of the home state to determine whether or not those rules have been violated. Others see it as part of the broader doctrine of state immunity: if a state cannot be held responsible for certain acts before a foreign court, it should not be possible for officials of that state to be held responsible either since this would otherwise allow the rule of state immunity to be circumvented.⁵⁸ The rule ensures, for example, that Dutch officials cannot be prosecuted in a foreign court on account of Dutch policy that is considered harmful or unlawful abroad.

As can be seen from the definition of aggression, the crime of aggression is, by definition, committed first and foremost by persons who exercise control over or direct, de jure or de facto, the state apparatus. Except for those who exercise de facto control, such persons commit the crime of aggression in their official capacity. This raises the question of whether functional immunity prevents prosecution for aggression before a foreign court.

The International Law Commission (ILC) is currently examining the broader question of whether functional immunity can be claimed by persons suspected of international crimes before foreign courts. In 2017, the ILC adopted a draft article providing that in criminal proceedings before the courts of foreign states functional immunity does not apply for six international crimes: genocide, crimes against humanity, war crimes, apartheid, torture and enforced disappearances.⁵⁹ The ILC deliberately did not mention the crime of aggression (although some members disagreed with this decision).⁶⁰



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The main reason given by the ILC was that prosecution by a national court of an official of another state for the crime of aggression would require the court to establish whether that other state had committed an act of aggression. This was seen as incompatible with the principle of the sovereign equality of states.⁶¹ Hence, the ILC does not actually exclude aggression from the international crimes for which no functional immunity should apply, but in fact says that under international law no jurisdiction can be exercised over persons suspected of this crime by states other than the aggressor state.⁶² If foreign courts do not have jurisdiction over persons suspected of the crime of aggression, functional immunity plays no role in the prosecution of this crime. However, if it is accepted that the crime of aggression can be prosecuted by other states (see the analysis in the answer to question 1 above), there seems to be no reason why the crime should be treated differently from other international crimes in respect of immunity.

The question is, however, whether Draft Article 7 is intended to codify existing international law or should be interpreted as indicating the direction in which the law should develop. It can be inferred both from the deliberations of the ILC and from the accompanying commentary that an important part of the ILC views this article as progressive development of international law and therefore not as existing international law. Moreover, some of the members voted against the adoption of this article when, very exceptionally, it was put to the vote.⁶³ The comments of states in the Sixth Committee of the UN General Assembly are also divided on this point. The official position of the Dutch government is that, under existing international law, functional immunity does not apply to international crimes.⁶⁴ However, there are also some states that express support for the idea that the law should develop in the direction indicated by the draft article and other states that completely reject the draft article.⁶⁵ And although there are important decisions by national courts rejecting functional immunity in relation to international crimes, that practice too is inconsistent.⁶⁶

On request, the CAVV will publish a further advisory report on this subject as the ILC has adopted the Draft Articles on The Immunity of

State Officials from Foreign Criminal Jurisdiction on first reading. For the moment, the CAVV would merely observe that there are good arguments for saying that functional immunity from criminal jurisdiction does not apply to international crimes; on the other hand, the CAVV notes that it is apparent from the heated discussions on Draft Article 7 in both the ILC and the Sixth Committee that the matter is not straightforward. As the exact status of the exception to immunity for international crimes cannot be determined with certainty at present, states have considerable leeway to apply the rule as they see fit. Although it is impossible to say with any certainty what the international law is on this point, the CAVV considers 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 trial by foreign courts of Russian leaders and military personnel for international crimes committed in Ukraine will accelerate the development of the law in this respect and may result in further acceptance of the exception to functional immunity for international crimes. The CAVV 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?

In the Arrest Warrant case, the ICJ held that personal immunity also applied to persons suspected of international crimes.⁶⁷ In an *obiter dictum*, the ICJ nonetheless noted that such immunity does not apply if they are prosecuted during or after their term of office before 'certain international criminal courts, where they have jurisdiction'.⁶⁸ The ICJ referred in particular to the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as the International Criminal Court.⁶⁹ The ICJ did not exclude the possibility that this might also apply to other tribunals, but left open the question of the conditions that such tribunals would have to meet.

The CAVV would point out that the UN Security Council can in any event set aside immunity on



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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. Indeed, resolutions adopted under Chapter VII can impose binding obligations on members of the UN, and obligations under the Charter take precedence over other rules of international law.⁷⁰ This could explain the reference in the *Arrest Warrant* case to the Rwanda and former Yugoslavia tribunals. Naturally, if the Security Council is blocked, this is not an option.

The ICC was established by treaty and does not have a basis for setting aside immunity such as that provided by Chapter VII. However, this does not prevent states that are party to the Rome Statute from agreeing among themselves that their nationals do not have personal or functional immunity before the ICC. In fact, they have done just that in Article 27 of the Statute.⁷¹ However, it is debatable whether this rule applies to nationals of third states (i.e. states not party to the Statute), since they have not agreed to this rule. It is by no means inconceivable that the ICC might exercise jurisdiction over nationals of third states, for example if they commit a crime in the territory of a state party to the Statute, or if the situation in a third state has been referred to the ICC by the UN Security Council. In a scenario in which such persons are sought by the ICC, Article 98, paragraph 1 of the Statute applies in principle. This provides that 'The Court may not proceed with a request for surrender or assistance which would require the requested State 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, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.' This provision seems to imply that third states can claim immunity from the ICC's jurisdiction. However, the ICC's Appeals Chamber held in 2019 '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'.⁷² According to the Appeals Chamber, 'international courts act on behalf of the international community as a whole'.⁷³ On this ground, it held that Jordan was obliged to arrest President Al-Bashir of Sudan and surrender him to the ICC, despite the fact that Sudan was not a party to the Rome Statute. Similarly, the Special

Court for Sierra Leone, which was established on the basis of an agreement between the UN and Sierra Leone, exercised jurisdiction over Charles Taylor, the then president of Liberia (a third state under this agreement), on the grounds that it was a 'truly international' tribunal; according to the Special Court, it was important that the agreement between the UN and Sierra Leone was an expression of the will of the international community.⁷⁴ The Special Court stated that immunities are of particular relevance to the horizontal relations between states, given the principle of sovereign equality, but *not* to international criminal tribunals, which derive their mandate from the international community.⁷⁵

It follows from these decisions of the International Criminal Court and the Special Court for Sierra Leone (a) that the personal immunity of third state nationals does not apply in the case of these tribunals and also (b) that such immunity possibly does not apply in the event that a new international tribunal is established, for example to try acts of aggression.

However, the judgments of the Special Court and especially the International Criminal Court are controversial.⁷⁶ The core of the criticism is that international law does not permit a group of states to impose obligations on third states without the latter's consent. This is known as the principle of the relative effect of treaties.⁷⁷ States cannot therefore simply decide among themselves that the immunity of a third state (or a representative of a third state) no longer applies, without the consent of the third state concerned. Even if it is recognised that a group of like-minded states can set up a tribunal to try the crime of aggression (in particular, by delegating jurisdiction to the tribunal), these states cannot, in principle, circumvent the immunity of a third state which was not involved in the establishment of the tribunal – and over whose officials the tribunal will exercise jurisdiction when the occasion arises. Ultimately, the only powers that states can delegate to an international tribunal are those that they themselves possess at the outset. States themselves do not have the power to disregard personal immunity. It follows that they cannot, in principle, delegate that power to an international tribunal.⁷⁸



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Another important criticism concerns the concept of an ‘international tribunal’. Not every international tribunal acts on behalf of ‘the international community as a whole’,⁷⁹ and it is unclear what makes a tribunal ‘truly international’.⁸⁰ Without a clear definition of the characteristics that make a tribunal sufficiently ‘international’ to warrant not recognising personal 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 finds this criticism convincing. Since the ICJ held in the *Arrest Warrant* case that heads of state, heads of government and ministers of foreign affairs can claim personal immunity before the national courts of other states – even if they are suspected of committing international crimes – it would seem that an international tribunal which has not been established by the suspect’s home state, and which lacks a Chapter VII basis must also respect this personal immunity.⁸¹ If the Netherlands nonetheless wishes to support a legal development in keeping with the view of the Special Court for Sierra Leone and the International Criminal Court, it should in any event advocate a distinctive and restrictive definition of the term ‘international tribunal’. It should be noted, incidentally, that in the event of such a development, high-ranking Dutch officials, in particular the prime minister and minister of foreign affairs, would also not be entitled to personal immunity before an international tribunal.

Finally, the question remains whether international tribunals should respect the *functional* immunity of officials of states that have not consented to the jurisdiction of the tribunal. As stated in the answer to question 3 above, a good case can be made for restricting functional immunity for international crimes before national criminal courts, either because it is consistent with international law or because it contributes to a legal development that is already well advanced. Since states may transfer their jurisdiction to prosecute to an international tribunal, this possibility applies *a fortiori* to international tribunals. Here, the definition of what constitutes an international tribunal is less important because the restriction of immunity

does not depend on the nature of the judicial body (national or international). Functional immunity is therefore not an obstacle to prosecution for the crime of aggression before an international tribunal. As states are more inclined to support restricting functional immunity before an international tribunal than before national courts,⁸² the CAVV considers that where an international tribunal is to be established to try persons suspected of international crimes who are nationals of a state that does not cooperate in the establishment of the tribunal, it would be preferable for the tribunal to be established by a large (and preferably representative) group of states.



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Conclusion and advice



contents

This final section summarises the key elements of the report point by point.

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 the position that there are several grounds for the exercise of jurisdiction understandable, particularly since this would ensure that the exercise of jurisdiction is aligned for 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 International Criminal Court's jurisdictional regime for aggression, thereby bringing 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 *troika* 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 that 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.



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Endnotes



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- ¹ For more information, see <https://www.centruminternationaalrecht.nl/nederlands>.
- ² The United Nations General Assembly defined the invasion as aggression on 2 March 2022, UN Doc. A/RES/ES-11/1.
- ³ See: <https://www.pgaction.org/pdf/2022/international-criminal-tribunal-putin.pdf>. The other signatories are the chairs of the foreign affairs committees of the parliaments of Belgium, Luxembourg, the three Baltic states, the Czech Republic, Poland, Romania, Slovenia, Ukraine, Ireland and the United Kingdom.
- ⁴ For example, see: <https://www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine>; <https://theelders.org/news/elders-call-criminal-tribunal-investigate-alleged-crime-aggression-ukraine>; <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>; <https://www.dailymail.co.uk/news/ukraine/article-10579137/PHILIPPE-SANDS-need-new-Nuremberg-trial-make-Putin-pay.html>.
- ⁵ Speech by Wopke Hoekstra, Dutch Minister of Foreign Affairs, at the Ukraine Accountability Conference, The Hague, 14 July 2022: '[W]e need an accountability strategy. A strategy driven by the universal belief that all of us are protected by law. Ensuring that all roads lead to justice. Now and in the future.'
- ⁶ Article 121, paragraph 5 of the Rome Statute.
- ⁷ Article 15 *bis*, paragraph 5 of the Rome Statute: 'In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.' This prohibition does not apply when the Security Council has referred a situation to the Prosecutor (see Article 15 *bis*, paragraph 1 of the Rome Statute).
- ⁸ See the statement by Norway at the Review Conference in Kampala (RC/11, D), and the Dutch endorsement of this position at the time of the implementation of the Kampala amendments, letter of 9 October 2015, Parliamentary Papers, House of Representatives, 2013/14, 33866, no. 8, pp. 2-3.
- ⁹ Cf. the international criminal tribunals for the former Yugoslavia and Rwanda.
- ¹⁰ Cf. the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.
- ¹¹ Cf. the Extraordinary African Chambers within the Courts of the Republic of Senegal, which had jurisdiction over Chad's former ruler, Hissène Habré.
- ¹² This is discussed in relation to question 1, where various sources are mentioned.
- ¹³ Article 8 *bis*, paragraph 1 of the Rome Statute: '(...) the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression (...)'.


- ¹⁴ ICC, judgment of 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, paragraph 58.
- ¹⁵ See, in particular, Article 27, paragraph 2 of the Rome Charter: '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.' See also ICC, judgment of 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, paragraph 61.
- ¹⁶ See, in particular, Article 7, ILC Draft Articles (2017), UN Doc A/CN.4/L.893.
- ¹⁷ Section 18 of the Advisory Bodies Framework Act (*Kaderwet adviescolleges*).
- ¹⁸ C. Ryngaert, *Jurisdiction in International Law* (OUP 2015, 2nd edition), pp. 101-142.
- ¹⁹ Act of 19 June 2003, containing rules relating to serious violations of international humanitarian law.
- ²⁰ Section 2, subsection 1 (a), International Crimes Act. The requirement of presence on Dutch territory does not apply if the offence was committed by or against a Dutch national, in which case prosecution in *absentia* is possible.

- ²¹ 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.
- ²² ILC, *Report of the Seventy-third session*, UN Doc. 10 (2022), p. 238, paragraph 21 (Immunity of State officials from foreign criminal jurisdiction).
- ²³ H.H. Koh and T.F. Buchwald, 'The Crime of Aggression: The United States Perspective', *American Journal of International Law* 2015, vol. 109, pp. 257 and 273-277.
- ²⁴ Article 15 bis, paragraph 5 of the Rome Statute. The Security Council may also refer a situation of aggression to the ICC under Article 15 *ter* of the Statute.
- ²⁵ Official Records of the Review Conference of the Rome Statute of the ICC, Kampala 2010, Annex III, Understanding 5.
- ²⁶ B. Van Schaack, 'Par in Parem Imperium Non Habet. Complementarity and the Crime of Aggression', *Journal of International Criminal Justice* 2012, Vol. 10, p. 133, 138.
- ²⁷ C. McDougall, 'Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two', *Oxford Human Rights Hub*, 8 March 2022, <https://ohrh.law.ox.ac.uk/prosecuting-putin-for-his-crime-of-aggression-against-ukraine-part-two>.
- ²⁸ See, for example, Article 437 of Ukraine's Criminal Code, https://sherloc.unodc.org/cld/uploads/res/document/ukr/2001/criminal-code-of-the-republic-of-ukraine-en_html/Ukraine_Criminal_Code_as_of_2010_EN.pdf.
- ²⁹ See, for example, Articles 112 and 117 of Poland's Criminal Code, https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/POL_penal_code.pdf.
- ³⁰ C. McDougall, 'Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two', *Oxford Human Rights Hub*, 8 March 2022, <https://ohrh.law.ox.ac.uk/prosecuting-putin-for-his-crime-of-aggression-against-ukraine-part-two>.
- ³¹ Section 2, subsection 1(a) in conjunction with section 8b of the International Crimes Act. However, this is linked to the physical presence requirement, as specified in section 2, subsection 1 (a) of the Act.
- ³² C. McDougall, 'Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics', *Opinio Juris*, 15 March 2022.
- ³³ K.J. Heller, 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis', *Journal of Genocide Research* 2022, <https://doi.org/10.1080/14623528.2022.2095094>.
- ³⁴ D. Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', *Oxford Legal Studies Research Paper No.10/2011*, 2011, pp 33-34, <https://ssrn.com/abstract=1762806>.
- ³⁵ See P. Wrangé, *The Crime of Aggression, Domestic Prosecutions and Complementarity*, in: Claus Kreß and Stefan Barriga, *The Crime of Aggression: A Commentary*, Cambridge University Press 2016, pp. 704-751 and the literature referred to in footnote 39.
- ³⁶ K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 113 (OUP 2011).
- ³⁷ Dutch Treaty Series 2011, no. 73.
- ³⁸ Nonetheless, several persons can simultaneously be in a position to exercise control over or direct the political or military action of a state. This will especially be the case in states where decisions on the use of force and waging war are made in consultation, according to the rules applicable there.
- ³⁹ K.J. Heller, Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression, *European Journal of International Law*, Vol. 18, no. 3, 2007, pp. 477-497. However, McDougall submits that the Nuremberg and Tokyo precedent is not fully coherent and unambiguous as regards the content and scope of the leadership criterion. C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 2nd ed. (CUP 2021), pp. 214-232.
- ⁴⁰ That this is indeed the case seems to be implied by the Parliamentary Assembly of the Council of Europe in Resolution 2436 (2022) of 28 April 2022



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concerning *The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes*. This Resolution states in paragraph 11.6.2 that a tribunal to be established 'should [...] apply the definition of the crime of aggression as established in customary international law, which has also inspired the definition of the crime of aggression in Article 8 bis of the Rome Statute of the ICC.' For an argument that a lower standard applies under customary international law, see K.J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', *European Journal of International Law*, Vol. 18, no. 3, 2007, pp. 477-497.

⁴¹ Ibid., p. 228.

⁴² See, for example, R. Heinsch, 'The Crime of Aggression after Kampala: Success or Burden for the Future?' in *Goettingen Journal of International Law*, Vol. 2, 2010, p. 723. K. Ambos, 'The Crime of Aggression after Kampala', *German Yearbook of International Law*, Vol. 53, 2011, p. 490 and N. Hajdin, 'The Nature of Leadership in the Crime of Aggression: The ICC's New Concern', *International Criminal Law Review*, Vol. 17, no. 3, 2017, pp. 543, 563 and 565.

⁴³ C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 2nd ed. (CUP 2021), p. 231. And also H.L. Pfeiffer, *The Crime of Aggression and the Participation Model of the Rome Statute*, Cologne, Institute for International Peace and Security, 2017, pp. 184-185.

⁴⁴ Article 89, paragraph 1 of Croatia's Criminal Code 2011 defines aggression in a manner consistent with the Rome Statute. Article 89, paragraph 2 provides as follows: 'Whoever takes part in the operations of the armed forces referred to in paragraph 1 of this article shall be sentenced to imprisonment for a term of between three to fifteen -years.'

⁴⁵ For an analysis, see: A. Reisinger Coracini, '(Extended) Synopsis: The Crime of Aggression under Domestic Criminal Law', in: Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary* (Cambridge University Press 2017), pp. 1038-1078.

⁴⁶ Article 437 of Ukraine's Criminal Code reads as follows: '1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring

for any such purposes shall be punishable by imprisonment for a term of seven to twelve years. 2. Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years.'

2. Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years."

⁴⁷ N.H.B. Jørgensen, 'Asia', in: Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary* (Cambridge University Press 2017), pp. 1038-1078.

⁴⁸ Ibid.

⁴⁹ ICJ, judgment of 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, paragraph 54.

⁵⁰ United Kingdom, Bow Street Magistrates' Court, 12 February 2004, *Re Mofaz*, ILDC 97 (UK 2004). The judge added that this would be unlikely to apply to other ministerial appointments such as Home Secretary, Employment Minister, Environment Minister, Culture Media and Sports Minister.

⁵¹ Switzerland, Swiss Federal Criminal Court, 25 July 2012, *Nezzar*, paragraph 5.4.2., https://www.asser.nl/upload/documents/20130221T040104-Nezzar_Judgm_Eng_translation%2025-07-2012.pdf

⁵² United Kingdom, Bow Street Magistrates' Court decision, 8 November 2005, *Bo Xilai*, 128 ILR 713, ILDC 429 (UK 2005).

⁵³ CAVV, 'Advisory Report on the Immunity of Foreign State Officials', 2 May 2011, pp. 33-34.

⁵⁴ UN Convention on Special Missions, New York, 8 December 1969. Article 1 (a) defines a 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.' As regards the inviolability and immunity of members of the special mission, see Articles 29 and 31 of the Convention. Under customary law too, state officials have ad hoc diplomatic immunity when paying an official visit abroad. For consideration of the differences between the scope of protection under the convention and under customary law, see M. Wood, 'The Immunity of Official Visitors', *Max Planck Yearbook of International Law*, vol. 16, 2012, pp. 35-98.



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- 55 As regards the scope of functional immunity, see the answer to question 3 below.
- 56 ICJ, judgment of 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, paragraph 53.
- 57 International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 29 October 1997, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Prosecutor v. Blaškić)*, IT-95-14, paragraph 38: '[State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity".'
- 58 The Hague Court of Appeal, 7 December 2021, ECLI:NL:GHDHA:2021:2374 (*Israeli army commanders*), paragraph 3.7.
- 59 Draft Article 7 on the Immunity of State Officials from Foreign Criminal Jurisdiction (2017). However, this provision is controversial, mainly because there is insufficient state practice on this subject. See C.A. Bradley, 'Symposium on the Present and Future of Foreign Official Immunity' in: *AJIL Unbound*, Vol. 112, 2018, pp. 1-37.
- 60 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, paragraph 122, <https://legal.un.org/ilc/reports/2017/english/chp7.pdf>.
- 61 *Ibid.*, p. 127, commentary 18.
- 62 See also: ILC, *Fifth report on the immunity of State officials from foreign criminal jurisdiction*, Concepción Escobar Hernández, Special Rapporteur, VN Doc A/CN.4/701 (2016), p. 87, paragraph 222.
- 63 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>. See also: Provisional summary record of the 3378th meeting, VN Doc A/CN.4/SR.3387 (2017), pp. 9-16.
- 64 See Statement by Dr René Lefeber (Legal Adviser of the Ministry of Foreign Affairs, Kingdom of the Netherlands), United Nations General Assembly, 72nd Session, Sixth Committee, Agenda item 82, Report of the International Law Commission, https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/netherlands_2.pdf.
- 65 United Nations General Assembly, Summary record of the 26th meeting, 7 December 2011, VN Doc A/C.6/66/SR.26.
- 66 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, paragraph 123, commentary 5, <https://legal.un.org/ilc/reports/2017/english/chp7.pdf>; Bundesgerichtshof (Federal Court of Justice of Germany), 28 January 2021, 3 StR 564/19 - OLG Munich, ECLI:DE:BGH:2021:280121U3STR564.19.0 (rejection of immunity); Cour de Cassation (French Court of Cassation), Arrêt n°42, 13 January 2021 (20-80.511), ECLI:FR:CCAS:2021:CR00042.
- 67 ICJ, judgment of 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, paragraph 58.
- 68 *Ibid.*, paragraph 61.
- 69 *Ibid.*
- 70 This concerns not only treaties, to which Article 103 of the UN Charter refers, but also, at least according to the majority opinion, rules of customary law. See M. Koskeniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682 (13 April 2006), paragraph 345. However, some authors doubt whether this is the case. See, for example, R. Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter', *ICLQ*, Vol. 57, 2008, pp. 583-612.
- 71 Article 27 of the Rome Statute provides as follows: '1. This Statute shall apply equally to all persons without any distinction based on official capacity.'



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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.’

⁷² ICC, 6 May 2019, *Jordan Referral re Al-Bashir Appeal*, ICC-02/05-01/09 OA2, paragraph 113.

⁷³ *Ibid.*, paragraph 115.

⁷⁴ Special Court for Sierra Leone, Appeals Chamber, 31 May 2004, *Taylor (Decision on Immunity from Jurisdiction)*, SCSL-2003-01-AR72(E), paragraph 38.

⁷⁵ *Ibid.*, paragraph 51.

⁷⁶ See, for example, D. Akande, ‘ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals’, *EJIL: Talk!*, 6 May 2019 and D. Jacobs, ‘You have just entered Narnia: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case’, *Spreading the Jam*, 6 May 2019.

⁷⁷ See also Article 34 of the Vienna Convention on the Law of Treaties: ‘A treaty does not create either obligations or rights for a third State without its consent.’

⁷⁸ This is an application of the classic legal maxims *nemo dat quod non habet* (no one can give what he does not have) and *nemo plus iuris ad alium transferre potest quam ipse habet* (no one can transfer more rights to another person than he himself has).

⁷⁹ See footnote 73, ICC, 6 May 2019, *Jordan Referral re Al-Bashir Appeal*, ICC-02/05-01/09 OA2, paragraph 115.

⁸⁰ See footnote 75, Special Court for Sierra Leone, Appeals Chamber, 31 May 2004, *Taylor (Decision on Immunity from Jurisdiction)*, SCSL-2003-01-AR72(E), paragraph 51.

⁸¹ It is noteworthy that both the International Criminal Court and the Special Court for Sierra Leone referred to Security Council resolutions in their judgments discussed above. The Special Court for Sierra Leone referred to Security Council Resolution 1315 (2000), which called on the UN Secretary-General to reach an agreement with Sierra Leone on the establishment of an international tribunal. See Special Court for Sierra Leone, Appeals Chamber, 31 May 2004, *Taylor (Decision on Immunity from Jurisdiction)*, SCSL-2003-01-AR72(E), paragraph 39. In the Al-Bashir case, four of the five judges of the ICC’s Appeals Chamber emphasised in their joint concurring opinion that the ICC’s conclusion that Al-Bashir was not entitled to immunity, ‘as it [this conclusion] specifically concerns resolution 1593 (2005) [this is the resolution referring the situation in Sudan to the ICC], depends on the unique circumstances of that resolution as a Chapter VII measure’, see ICC, 6 May 2019, *Jordan Referral re Al-Bashir Appeal*, ICC-02/05-01/09 OA2, OA2, Joint Concurring Opinion, paragraph 445. The CAVV cannot escape the impression that the fact that immunity was rejected in these two cases was due, at least in part, to a resolution of the Security Council, whether binding or otherwise.

⁸² For example, Russia opposed Draft Article 7 in the Sixth Committee but added the following: ‘There [are] other ways of prosecuting the perpetrator of a crime, for example, in the person’s own State or in properly constituted international bodies.’ See also 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, p. 117, paragraph 100.



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