



**Advisory Committee
on Public International Law**

Advisory report on the long-term consequences of establishing an alternative tribunal for the crime of aggression and other options for prosecuting Russia's President Putin

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Introduction

On 17 October 2023, the House of Representatives asked the Advisory Committee on Issues of Public International Law (CAVV) for an advisory report on the long-term consequences of establishing an alternative tribunal for the crime of aggression and other options for prosecuting Russia's President Putin. More specifically it asked for:

- (1) a description of the various alternatives in terms of the scope offered by international law for prosecuting Russian crimes in Ukraine;
- (2) a description of the various alternatives for prosecuting President Putin;
- (3) an explanation of the possible added value or necessity of an alternative tribunal for the crime of aggression;
- (4) an explanation of the usefulness and necessity of amending article 15 *bis* of the Rome Statute to enable the International Criminal Court to exercise jurisdiction over crimes of aggression committed by a state that is not a party to the Statute in the territory of a state that is;
- (5) an analysis of the consequences for the international legal order of the establishment of an aggression tribunal (in whatever form), with a specific focus on the expected effects on the functioning of the International Criminal Court in particular.

In this advisory report, the CAVV will deal with these questions in this order, building on its advisory report no. 40 from 2022 on challenges in prosecuting the crime of aggression (jurisdiction and immunities).



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Russian crimes in Ukraine, or in more general terms international crimes committed in the war between Russia and Ukraine (by whichever party), can be investigated under criminal law by both the International Criminal Court (ICC) and domestic courts. Aggression is typically a crime that is prosecuted by an international court. However, the ICC has no jurisdiction over the aggression committed by Russia against Ukraine.

Although neither Russia nor Ukraine is a party to the ICC's Rome Statute, Ukraine 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 2 March 2022, the Prosecutor of the ICC opened an investigation into possible war crimes, crimes against humanity or genocide committed in Ukraine from 21 November 2013 onwards. On 17 March 2023 ICC Pre-Trial Chamber II issued warrants of arrest for Vladimir Putin, President of the Russian Federation, and Maria Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation.¹ The ICC considered that there were reasonable grounds to believe that these suspects bear responsibility for the unlawful deportation and transfer of children from occupied areas of Ukraine to the Russian Federation, which constitutes a war crime. It cannot be ruled out that further warrants of arrest (whether public or not) will be issued for other persons or for other crimes.

The ICC can prosecute all war crimes, crimes against humanity and acts of genocide committed in Ukraine. However, as the CAVV noted in advisory report no. 40, the ICC cannot exercise jurisdiction over the aggression committed by Russia against Ukraine.² The rules concerning jurisdiction over the crime of aggression differ from the system that applies to all other crimes over which the ICC has jurisdiction. The crime of aggression can be prosecuted only if the state responsible for the aggression is a party to the Statute and additionally has either separately accepted the ICC's jurisdiction over the crime of aggression³ or has not lodged an

opt-out declaration with the Registrar,⁴ or if the UN Security Council refers the situation to the Prosecutor.⁵ In advisory report no. 40 the CAVV pointed out that, 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. A separate tribunal could be established to prosecute those persons. This will be discussed in section 3.

Crimes committed in Ukraine can of course also be prosecuted by Ukraine itself. Ukrainian prosecutors and investigators have already documented countless war crimes allegedly committed by Russian troops in Ukraine. Several individuals have also been tried by Ukrainian courts for war crimes and aggression.⁶

Furthermore, countries other than Ukraine can prosecute international crimes committed in Ukraine, on the basis of the (active or passive) personality principle or the universality principle. For instance, Russia could prosecute President Putin on the basis of the active personality principle (nationality principle) or the – subjective – territoriality principle, although the CAVV considers this unlikely, for obvious reasons. Various states have started investigating crimes committed in Ukraine, on the basis of the universality principle.⁷ Most states (including the Netherlands) do require the suspect to be present in the territory in question *before* jurisdiction can be exercised.

In advisory report no. 40, the CAVV noted that there are differing views on the exercise of jurisdiction over the crime of aggression at national level. The government has argued, basing its view on the CAVV's advice, that there are several grounds for the exercise of jurisdiction – including territorial and universal jurisdiction – over international crimes, including the crime of aggression.⁸ On the basis of this position, Ukraine and other countries could also exercise jurisdiction over the crime of aggression. In the Netherlands there is universal jurisdiction over aggression on the basis of the International Crimes Act (in so far as the suspect is present in the territory).⁹



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What are the various alternatives for prosecuting Russia's President Putin?

As explained in section 1, the ICC has already issued a warrant of arrest for President Putin. No one can claim immunity from the ICC's jurisdiction.¹⁰ The ICC's Appeals Chamber found in 2019 that this rule also applies to heads of states that are not a party to the Rome Statute, because it reflects the status of customary international law.¹¹ In advisory report no. 40, the CAVV was not convinced this rule was part of customary international law.¹² However, it is unlikely that the ICC will reconsider its judgment. The ICC can therefore exercise jurisdiction over President Putin, which is apparent from the warrant of arrest issued against him. However, it remains to be seen whether Putin will ever be brought before the ICC, as the ICC cannot try anyone *in absentia*. If he were not to appear before the ICC voluntarily, he would therefore have to be arrested by a state and surrendered to the ICC.¹³

In principle, President Putin cannot be prosecuted before domestic courts of Ukraine or another country. This follows from the judgment in the *Arrest Warrant* case, in which the International Court of Justice (ICJ) held that incumbent heads of state, heads of government or foreign ministers are inviolable and enjoy absolute personal immunity from the criminal jurisdiction of foreign states, even where the prosecution concerns international crimes.¹⁴ Once Putin is no longer president, it might be possible to prosecute him before the courts of another state because he will no longer enjoy personal immunity. In its advisory report no. 43 from 2023, the CAVV argued that functional immunity of foreign state officials does not apply to crimes under international law for which individual criminal responsibility and universal jurisdiction are accepted under customary international law,¹⁵ although in advisory report no. 40, in 2022, it did also note that the matter of universal jurisdiction over the crime of aggression is controversial.¹⁶ The International Law Commission (ILC) has, for now, taken the position that immunity *ratione materiae*, i.e. functional immunity, should not apply to international crimes, although there

are differences of opinion on this within the ILC and the ILC apparently does not consider the exception to immunity applicable to the crime of aggression.¹⁷ In any case this *could* mean that Putin (after his term of office has ended) cannot invoke immunity *ratione materiae* in the event that he is prosecuted for decisions that led to international crimes.

For the crime of aggression, Putin could also be tried by an international or hybrid (domestic/international) tribunal. A number of countries, mainly Western, are thinking about the establishment of such a tribunal. This is discussed in greater depth in section 3.

— 3

What is the possible added value or necessity of an alternative tribunal for the crime of aggression?

The CAVV has described the ICC's inability to exercise jurisdiction over the crime of aggression in the case of Russia's aggression against Ukraine as an 'accountability gap'.¹⁸ The government agreed that a gap exists with regard to the situation in Ukraine and stated that 'the Netherlands is working to explore other ways of prosecuting the crime of aggression, for example through a special aggression tribunal.'¹⁹

Although the ICC can prosecute and is prosecuting other crimes committed in Ukraine (particularly war crimes), prosecution of Russia's aggression against Ukraine by an alternative tribunal would have significant added value. The establishment of such a tribunal would primarily send the message that the prohibition of the use of force in international relations, as laid down in article 2, paragraph 4 of the United Nations Charter, cannot be violated with impunity. Prosecuting the crime of aggression – a serious violation of article 2, paragraph 4 – would strengthen this prohibition and could have a deterrent effect vis-à-vis future forms of aggression. It would bring the aggressor to account for all kinds of suffering that as such does not qualify as any other international crime, including the suffering (death, injury) inflicted on Ukrainian fighters (who are legitimate targets under international humanitarian law).²⁰

The CAVV is aware that (mainly Western) advocates of a special aggression tribunal for



Russia are opening themselves to accusations of hypocrisy, given that previous alleged acts of aggression, committed *inter alia* by Western powers, were not prosecuted. However, in the CAVV's view the fact that these acts were not prosecuted in the past does not mean that impunity should be the norm for the crime of aggression. On the contrary, now that there is a clear definition of aggression (since 2010) in article 8 *bis* of the Rome Statute, the establishment of an aggression tribunal for Russia could pave the way for more consistent prosecution of crimes of aggression, committed by any state, and for the expansion of the ICC's jurisdiction over the crime of aggression (see section 4). The establishment of such a tribunal could therefore set an important precedent, in combination with amendment of the Rome Statute. If in the future the ICC still has no jurisdiction over certain acts of aggression, the establishment of ad hoc tribunals for these acts would again be the logical course of action. The CAVV would note that for the sake of the integrity and credibility of international law, the Netherlands must press for prosecution of crimes of aggression by an ad hoc tribunal even if the aggressor is an ally.

An aggression tribunal could take the form of a fully international tribunal or a 'hybrid' tribunal, i.e. one with both an international and a domestic component, established within the existing judicial structure of a state, comprising international and domestic prosecutors, and applying international law.²¹ In the present advisory report, the CAVV will not offer an opinion on the precise form an aggression tribunal should take. It would point out, however, as set out in advisory report no. 40, 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'.²² Nevertheless the CAVV noted in that advisory report that the Netherlands could back a legal development under which personal immunities do not apply before a larger group of international tribunals. In doing so, it would be important to advocate a distinctive and restrictive definition of the term 'international tribunal.'²³ A hybrid tribunal

could potentially also qualify as an international tribunal. This would require states' relevant legal practice in favour of this legal development to be sufficiently extensive, representative and consistent. Specifically, that means that a large majority of states within the international community must support this development on legal grounds.²⁴ If that legal development does not come to fruition, personal immunity, more specifically that of the Russian president, will continue to apply. That does not change the fact, however, that an aggression tribunal *can* prosecute *other* individuals – those who do not enjoy personal immunity. In advisory report no. 40, the CAVV pointed to, *inter alia*, 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, in this case against Ukraine.²⁵

The likelihood of Russian suspects actually appearing before a hybrid tribunal is, for now at least, minimal. However, establishing such a tribunal would not be merely an act of political symbolism; issuing a warrant of arrest can limit a suspect's ability to travel internationally, as they will want to avoid countries that might arrest them and surrender them to the tribunal.²⁶ And there is also the possibility²⁷ of trying suspects *in absentia* before a hybrid tribunal.²⁸

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What is the use and necessity of amending article 15 bis of the Statute of Rome to enable the International Criminal Court to exercise jurisdiction over crimes of aggression committed by a state that is not a party to the Statute in the territory of a state that is?

States Parties to the Rome Statute automatically accept the ICC's jurisdiction over war crimes, crimes against humanity and genocide.²⁹ The ICC has jurisdiction when the crime was committed by a national of a State Party to the Statute or if the crime was committed on the territory of a State Party to the Statute.³⁰ The latter means that if a crime is committed by a national of a state that is not a party to the Statute on the territory of a State Party to the Statute, the ICC has jurisdiction. In other words, the Statute has third-party effect on the individual in question.



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In the run-up to the Kampala Review Conference in 2010, states were unable to agree on the applicability of this ‘regular’ jurisdictional rule to the crime of aggression. In the end, the Assembly of States Parties (ASP) decided to deviate, as regards aggression, from the standard rules in a number of respects.

First of all, article 15 *bis*, paragraph 5 of the Rome Statute precludes the aforementioned third-party effect when it comes to aggression.³¹

Secondly, article 15 *bis*, paragraph 4 creates the possibility for States Parties to opt out. A State Party can declare in advance that it does not accept the ICC’s jurisdiction over aggression by lodging a declaration with the Registrar. The decision by the states in Kampala to create this opt-out possibility was prompted mainly by the lack of clarity about the scope of the territorial jurisdiction over aggression (does the aggressor state have jurisdiction, or the victim state, or both?) and the importance of ratifying or not ratifying³² the aggression amendments (does the ICC’s jurisdiction require ratification by both the aggressor state and the victim state?).

Thirdly, consultation with the UN Security Council is required before the Prosecutor can proceed with a *proprio motu* investigation. In Kampala, there was disagreement over the role of the UN Security Council in the referral of an act of aggression to the ICC. A number of states took the view that only the Security Council may refer an act of aggression to the ICC.³³ Other states did not want the Security Council to have this ‘filter’ role, or in any case not exclusively. The final outcome of the negotiations in Kampala was that the Security Council, the States Parties and the Prosecutor can refer a situation of aggression to the ICC *proprio motu*. There is, however, an extra threshold for a referral by a state or the Prosecutor *proprio motu*. Before the ICC can exercise jurisdiction over aggression, the Pre-Trial Chamber must authorise it.³⁴ In addition, the Prosecutor must ascertain whether the Security Council has made a determination of an act of aggression.³⁵ This acknowledges the important role of the UN Security Council with regard to the prohibition of the use of force as laid down in the UN Charter.

The Kampala amendments to the Statute were adopted as a ‘package deal’ and entered into force on 17 July 2018.³⁶

To this day, there is debate on the Kampala amendments and the jurisdictional regime for aggression. It centres around the interpretation of the opt-out provision of article 15 *bis*, paragraph 4 of the Rome Statute and the stipulation on amendments in article 121, paragraph 5, second sentence of the Rome Statute. One group of states is in favour of a narrow interpretation. That interpretation entails that even without an opt-out declaration the ICC has no jurisdiction over aggression. The ICC has jurisdiction only if both the state whose national has committed an act of aggression and the state on whose territory an act of aggression has been committed have ratified the Kampala amendments. So the ICC has no jurisdiction over crimes of aggression committed by nationals of a state such as the United Kingdom, which has not lodged an opt-out declaration, but has also not ratified the Kampala amendments. Another, larger group of states is in favour of a broad interpretation. Under that broad interpretation, as long as the aggressor state has not lodged an opt-out declaration and the Kampala amendments have been ratified by either the aggressor state or the victim state, the ICC has jurisdiction over the crime of aggression. In other words, non-ratification by an aggressor state (which has not lodged an opt-out declaration) cannot block the ICC’s jurisdiction over the crime of aggression if the victim state has ratified the Kampala amendments.

States that favour the narrow interpretation persist in their position, pointing to a classic principle of treaty law: consent to be bound. In the end, the ASP resolution on the activation of the ICC’s jurisdiction over the crime of aggression included the statement that ‘in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments’.³⁷ In the same resolution, the ASP reaffirms the judicial independence of the judges of the Court.³⁸ The first statement is considered to be a concession to the states that favour the narrow interpretation, whereas the second statement,



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on the independence of judges, is viewed as a gesture towards the group of states that favour the broad interpretation. The CAVV believes that this debate should be resolved at the level of the ASP and not left to the judges.

The different, limited jurisdictional regime that has applied to the crime of aggression since the adoption of the amendments is viewed as restrictive and has become the subject of debate since the war in Ukraine started. Interest groups and think tanks have proposed that a new version of article 15 *bis*, paragraphs 4 and 5 be adopted that is harmonised with the other jurisdictional rules of the Rome Statute, via a reference to article 12.³⁹ In fact the proposal entails copying those jurisdictional rules and replacing the current paragraphs 4 and 5 with them.⁴⁰ Both the Global Institute for the Prevention of Aggression (GIPA)⁴¹ and Parliamentarians for Global Action⁴² propose deleting article 15 *bis*, paragraph 5, the provision that precludes third-party effect for states that are not a party to the Rome Statute. It is desirable to remove this provision in order to put the crime of aggression on a par with the other international crimes. The ICC has since gained experience in exercising jurisdiction over nationals of states that are not a party to the Rome Statute. It is important, however, for the proposed amendment to respect the status quo of states that have not accepted the ICC's jurisdiction over the crime of aggression.⁴³

Expansion and harmonisation of the jurisdictional rules for the crime of aggression is important for the mission of the ICC, which is to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.⁴⁴ This mission relates to *all* crimes. Changing the current, limited jurisdictional rules for the crime of aggression is important in order to treat this crime – traditionally the 'odd one out' – on a par with war crimes, crimes against humanity and genocide. The Netherlands does this by establishing universal jurisdiction over the crime of aggression.

Aggression is a 'leadership crime', i.e. a crime that is generally committed as part of official policy. The CAVV believes that for the crime of

aggression the ICC should not be a 'court of last resort' but rather a 'preferred court'.

Harmonising the jurisdictional rules in the Rome Statute would also remove the problem of the disputed meaning of article 15 *bis*, paragraph 4. In fact it would codify the 'broad interpretation' and remove the opt-out provision. The ICC would then have jurisdiction over the crime of aggression if the victim state is a party to the Rome Statute and has ratified or accepted the Kampala amendments, or if it has accepted the ICC's jurisdiction over the crime of aggression by means of a separate declaration.⁴⁵

In light of the above, the CAVV believes that the usefulness and necessity of amending article 15 *bis* can be found in the fact that this would put aggression on a par with the other international crimes and end the disagreement over the current jurisdictional rules for aggression.

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What would the consequences for the international legal order be of the establishment of an aggression tribunal (in whatever form)? What effects would this be expected to have on the functioning of the International Criminal Court in particular?

As the CAVV made clear in advisory report no. 40, the establishment of an aggression tribunal (in whatever form) could strengthen the traditional criticism of selective application of the law.⁴⁶ In addition, the establishment of an aggression tribunal could be considered as undermining the ICC and be viewed as a further fragmentation of the international criminal justice system. The fact that the 22nd session of the ASP, which began in New York on 4 December 2023, focused on *uniform* enforcement of the law is significant.

The CAVV believes that support for an initiative to establish an aggression tribunal should go hand in hand with support for proposals to amend the ICC's jurisdictional rules for the crime of aggression. Such an amendment will not necessarily make it possible to prosecute President Putin before the ICC, due to article 24, paragraph 1 of the Rome Statute (prohibition of retroactivity).⁴⁷ Treating the special or hybrid tribunal as an intermediate step, i.e. an initiative



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to fill a gap pending the conferral of full jurisdiction on the ICC, *alongside* amendment of the Rome Statute (a two-track approach), would strengthen the legitimacy of the aggression tribunal. This two-track approach would also strengthen the ICC, which is ultimately the most appropriate institution to prosecute and try the crime of aggression.

There is a degree of scepticism with regard to the establishment of an aggression tribunal. The Prosecutor of the ICC believes that states should focus mainly on the existing courts rather than establishing a new tribunal.⁴⁸ This position is understandable in view of the negative impact the establishment of an aggression tribunal might have on the ICC, particularly the risk of a decline in support, including funding, for the Court. However, as mentioned above, an aggression tribunal could also be viewed as an intermediate step towards, or even an extension⁴⁹ of, the ICC. In any case, the CAVV emphasises the importance of making agreements on cooperation and a division of tasks between an aggression tribunal and the ICC.⁵⁰ This is essential in order to safeguard and consolidate the unique and important position of the ICC in the international criminal justice system.

Lastly, the CAVV would point out that supporting the amendment, and thus the expansion⁵¹ of the jurisdictional rules on aggression in the Rome Statute, may have consequences for the Netherlands. In the event that Dutch public servants participate in operations that cannot be qualified as self-defence within the meaning of the UN Charter, or are not mandated by the UN Security Council, they may run the risk of being prosecuted for the crime of aggression. This emphasises all the more clearly how important it is for military operations to have an adequate mandate under international law.⁵²

Conclusion and advice



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In this advisory report, the CAVV discussed the options for prosecuting President Putin, and the long-term consequences of establishing an alternative tribunal for the crime of aggression, in the light of the Rome Statute of the International Criminal Court (ICC).

The House of Representatives submitted five questions to the CAVV. The CAVV's advice can be summarised as follows:

1. War crimes, crimes against humanity or genocide committed in Ukraine can be prosecuted by either the ICC or individual states, on the basis of the territoriality, personality or universality principle. The ICC has no jurisdiction over the acts of aggression committed by Russia against Ukraine. States do have that jurisdiction, on the basis of the above-mentioned principles.
2. Russia's President Putin can be prosecuted before the ICC, at least according to the ICC itself. As long as he is head of state, Putin cannot be prosecuted before domestic courts, but this could be possible after his term in office ends.
3. The establishment of an ad hoc aggression tribunal for Russia's acts of aggression would strengthen the international prohibition on the use of force and could pave the way for more consistent prosecution of crimes of aggression, committed by any state, and for the expansion of the ICC's jurisdiction over the crime of aggression. For the sake of the integrity and credibility of international law, the Netherlands must press, both now and in the future, for prosecution of crimes of aggression by an ad hoc tribunal, even if the aggressor is an ally. Under current international law, personal immunity forms an obstacle to the prosecution of Putin before such a tribunal. The Netherlands could focus its efforts on the development of a new rule that stipulates that personal immunities do not apply before a larger group of international tribunals, but amending a rule of international law would require the support, on legal grounds, of a large majority of the community of states.
4. Amending article 15 *bis* of the Rome Statute would expand the ICC's ability to prosecute and try crimes of aggression, and strengthen its mandate. It would put the crime of aggression on a par with the other international crimes, and end the disagreement over the interpretation of the current jurisdictional rules for aggression.
5. The initiative to establish an aggression tribunal could have a positive effect on the functioning of the ICC, as long as it goes hand in hand with support for proposals to amend the jurisdictional rules for the crime of aggression in the Rome Statute. The establishment of an aggression tribunal should be viewed as an intermediate step, i.e. an initiative to fill a gap until the ICC gains jurisdiction over the crime of aggression, through amendment of the Rome Statute. This two-track approach would strengthen trust in the ICC, which is ultimately the most appropriate institution to prosecute and try the crime of aggression. If an aggression tribunal is established, it will be important to make agreements with the ICC on coordination and a division of tasks. Supporting the amendment of the jurisdictional rules on aggression in the Rome Statute may have consequences for the Netherlands.

Endnotes

- ¹ See ICC ‘Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’, 17 March 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova>.
- ² CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, p. 4.
- ³ Article 121, paragraph 5 of the Rome Statute of the International Criminal Court (‘Rome Statute’).
- ⁴ Article 15 *bis*, paragraph 4 of the Rome Statute.
- ⁵ Article 15 *ter*, paragraph 1 of the Rome Statute.
- ⁶ ‘Ukraine’s Quest for Justice: A Conversation with Prosecutor General Andriy Kostin’, Event transcript, Carnegie Endowment for International Peace, 26 September 2023; ‘Map of War Crimes Trials in Ukraine’, JusticeInfo.Net Fondation Hironnelle, see: <https://www.justiceinfo.net/en/109654-map-of-war-crimes-trials-in-ukraine.html>.
- ⁷ Y.M. Dutton, ‘Prosecuting Atrocities Committed in Ukraine: A New Era for Universal Jurisdiction?’, 55 *Case W. Res. J. Int’l L.* 391, 2023.
- ⁸ Government response to CAVV Advisory Report no. 40, Parliamentary Papers, House of Representatives 2023/2024, 36 410 V, no. 13; CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, p. 9.
- ⁹ Section 2, subsection 1 in conjunction with section 8b of the Act of 19 June 2003 containing rules relating to serious violations of international humanitarian law (International Crimes Act).
- ¹⁰ Article 27 of the Rome Statute.
- ¹¹ ICC, 6 May 2019, *Jordan Referral re Al-Bashir Appeal*, ICC-02/05-01/09 OA2, paragraph 113. As the situation in Sudan had been referred to the ICC by the Security Council, it is possible that the finding that there was no immunity was based partly on a binding Security Council resolution. See CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, endnote 81.
- ¹² CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, pp. 14-15.
- ¹³ Articles 58 and 89 of the Rome Statute.
- ¹⁴ ICJ, 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment, I.C.J. Reports 2002*, paragraph 54.
- ¹⁵ CAVV, *Advisory report on the draft articles of the International Law Commission on immunity of State officials from foreign criminal jurisdiction*, Advisory Report no. 43, 30 June 2023, p. 35.
- ¹⁶ CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, pp. 6-7. The CAVV has nevertheless expressed its support for it, and in its response to this advisory report the government also supported universal jurisdiction over the crime of aggression. Government response to CAVV advisory report no. 40, Parliamentary Papers, House of Representatives 2023/2024, 36 410 V, no. 13, pp. 6-7.
- ¹⁷ ILC, Report of the International Law Commission, seventy-third session, UN Doc A/77/10 (2022), pp. 190-286, article 7(1): ‘Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of *apartheid*; (e) torture; (f) enforced disappearance.’ There is debate as to whether article 7 should apply to the crime of aggression.
- ¹⁸ See CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, pp. 4-5.
- ¹⁹ Government response to CAVV advisory report no. 40, Parliamentary Papers, House of Representatives 2023/2024, 36 410 V, no. 13, p. 7.
- ²⁰ C. McDougall, ‘The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine’, *Journal of Conflict & Security Law*, Vol. 28, No. 2, 2023, pp. 226-227; T. Dannenbaum, ‘A Special Tribunal for the Crime of Aggression?’ *Journal of International Criminal Justice*, Vol. 20, No. 4, 2022, p. 863.



- 21 For an analysis of the various options, see: K.J. Heller, 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis', *Journal of Genocide Research* 6 July 2022, <https://doi.org/10.1080/14623528.2022.2095094>; P.I. Labuda, 'Making Counter-Hegemonic International Law: Should a Special Tribunal for Aggression be International or Hybrid?', *Just Security* 19 September 2023.
- 22 CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, p. 17. See also A. de Hoogh, 'Personal Immunities Redux before A Special Tribunal for Prosecuting Russian Crimes of Aggression: Resistance is Futile!', *EJIL:Talk!*, 5 January 2024.
- 23 Ibid.
- 24 States could adopt a position on this within the UN General Assembly. See R. van Alebeek, L. van den Herik, C. Ryngaert, 'Prosecuting Russian Officials for the Crime of Aggression: What About Immunities?', *European Convention on Human Rights Law Review* 4, 2023, p. 128.
- 25 CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, p. 10.
- 26 For instance, Putin may have decided not to attend the BRICS summit in South Africa in person for fear of being arrested on the grounds of the warrant of arrest issued against him by the ICC. See 'Why Putin Is Dialing In to the BRICS Summit Rather Than Attending in Person', *Time Magazine* 21 August 2023.
- 27 J. Trahan, 'Negotiating the Amendment on the Crime of Aggression: Proceedings at the Kampala Review Conference on the International Criminal Court', 11 *Int'l Crim. L. Rev.* 49, 2011; C. Kreß and S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge, 2017.
- 28 See for instance article 22 of the Statute of the Special Tribunal for Lebanon. In addition three of the four defendants in the MH17 trial in the Netherlands were tried *in absentia*. See <https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial>.
- 29 Article 12, paragraph 1 of the Rome Statute.
- 30 Article 12, paragraph 2 of the Rome Statute. If the Security Council refers a situation, the ICC has jurisdiction regardless of whether the state in question is a party to the Statute (article 13(b) and for aggression: article 15 *ter* of the Rome Statute).
- 31 Article 15 *bis*, paragraph 5 stipulates: '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.'
- 32 For acceptance and ratification status of the amendments, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en.
- 33 J. Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', 11 *Int'l Crim. L.R.* 49, 2011, p. 61.
- 34 Article 15 *bis*, paragraph 8 of the Rome Statute. The same procedure applies to *proprio motu* investigations of the other crimes (article 15 of the Rome Statute).
- 35 Article 15 *bis*, paragraph 6 of the Rome Statute. If no such determination has been made, the Prosecutor waits until six months after the date of notification before proceeding with the investigation in respect of a crime of aggression.
- 36 Resolution ICC-ASP/16/Res.5 on the Activation of the Jurisdiction of the Court over the Crime of Aggression of 14 December 2017 (adopted by consensus by the ICC Assembly of States Parties).
- 37 Resolution ICC-ASP/16/Res.5, 2017, paragraph 2.
- 38 Ibid., paragraph 3.
- 39 See J. Trahan, 'Amending the Kampala Amendments: A Proposal to Harmonize the ICC's Jurisdiction', *Opinio Juris*, 2 October 2023: <https://opiniojuris.org/2023/10/02/amending-the-kampala-amendments-a-proposal-to-harmonize-the-iccs-jurisdiction/> with reference to the proposal by the Global Institute for the Prevention of Aggression (GIPA), *Proposal for the Amendment of the Conditions under which the International Criminal Court exercises jurisdiction over the Crime of Aggression*, 9 September 2023, Annex 1, p. 2.



- 40 GIPA proposal: Amendments to article 15 bis: Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)
1. Article 15 bis, paragraphs (4) and (5) are deleted.
 2. The following text is inserted after article 15 bis, paragraph (3) of the Statute:
 4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression if one or more of the following States have ratified or accepted the aggression amendments, or have accepted the exercise of the jurisdiction of the Court over the crime of aggression in accordance with paragraph 5:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
 5. If the acceptance of a State that has not ratified or accepted the aggression amendments, or which is not a Party to this Statute, is required under paragraph 4, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court over the crime of aggression in accordance with article 12, paragraph 3.
- 41 Resolution ICC-ASP/16/Res.5 on the Activation of the Jurisdiction of the Court over the Crime of Aggression, 14 December 2017 (adopted by consensus by the ICC Assembly of States Parties).
- 42 Parliamentarians for Global Action, *Proposal to Amend the Rome Statute Kampala Amendment on the Crime of Aggression*, 20 February 2023: <https://www.pgaction.org/news/proposal-to-amend-kampala-amendment-crime-of-aggression.html>.
- 43 For the states that have ratified the Kampala amendments, the changes apply as of the date on which the ICC's jurisdiction over the crime of aggression came into effect: 17 July 2018.
- 44 Rome Statute, preamble, paragraph 5.
- 45 As Ukraine has done with regard to the ICC's jurisdiction over the other international crimes.
- 46 CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022, p. 16.
- 47 This means that rapid amendment and ratification of those amendments is needed as discussed in section 4 of this advisory report. The war could go on for years.
- 48 In an interview with Nick Shifrin, he said: 'I think we should focus on mobilizing what is already here, what already exists. But we can become rather self-indulgent in creating things that we would like. I'd rather focus on what we have and put it into action effectively.', *PBS News Hour* 22 June 2022, see: <https://www.pbs.org/newshour/show/international-criminal-courts-top-prosecutor-discusses-justice-for-russian-war-crimes>.
- 49 In the words of David Scheffer 'de facto extension', see D. Scheffer, 'Forging a Cooperative Relationship Between International Criminal Court and a Special Tribunal for Aggression Against Ukraine', *Just Security* 25 October 2022.
- 50 Ibid.
- 51 As things currently stand, in order for the ICC to have jurisdiction, both states involved in an act of aggression – the aggressor state and the victim state – must accept the ICC's jurisdiction over the crime of aggression (see endnote 35). The proposed amendment of the Rome Statute would mean that the standard jurisdictional rules apply to aggression; the ICC would 'automatically' have jurisdiction.
- 52 See Committee of Inquiry on Iraq (the Davids Committee), *Report by the Committee of Inquiry on Iraq*, Boom Amsterdam, 2010: <https://actorenregister.nationaalarchief.nl/sites/default/files/2020-11/rapport-commissie-irak.pdf>.



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List of abbreviations

ASP

Assembly of States Parties

CAVV

Advisory Committee on Issues of Public International Law

GIPA

Global Institute for the Prevention of Aggression

ICC

International Criminal Court

ICJ

International Court of Justice

ILC

International Law Commission

UN

United Nations



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