

Government response to the advisory report of the Advisory Committee on Issues of Public International Law (CAVV) entitled 'The long-term consequences of establishing an alternative tribunal for the crime of aggression and other options for prosecuting Russia's President Putin'

1. 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 Russian President Vladimir Putin. On 24 January 2024, the CAVV adopted the advisory report. On 5 February, the House requested the government's response to the report.

At the House's request, the CAVV answered the following five questions in its report:

1. What scope does international law offer for prosecuting Russian crimes in Ukraine?
2. What are the various alternatives for prosecuting Russia's President Putin?
3. What is the possible added value or necessity of an alternative tribunal for the crime of aggression?
4. What is 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. 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?

In answering these five questions, the CAVV builds on advisory report no. 40 on challenges in prosecuting the crime of aggression (jurisdiction and immunities)¹ and advisory report no. 43 on the draft articles of the International Law Commission on immunity of State officials from foreign criminal jurisdiction.²

2. Key elements of the CAVV advisory report

Question 1: What scope does international law offer for prosecuting Russian crimes in Ukraine?

The CAVV states that crimes committed in the war between Russia and Ukraine can be prosecuted by the International Criminal Court (ICC), national authorities or an ad hoc tribunal.

With regard to the ICC the CAVV explains that, although neither Russia nor Ukraine is a party to the Rome Statute of the ICC ('the Statute'), Ukraine has made two declarations in accordance with article 12, paragraph 3 of the Statute accepting the ICC's jurisdiction over crimes committed in its territory since 21 November 2013. On this basis the Prosecutor of the ICC opened an investigation into possible war crimes, crimes against humanity or genocide committed in Ukraine from that date onwards and, in this context, warrants of arrest have been issued against various Russian officials, including President Putin. However, as the CAVV already noted in advisory report no. 40, the ICC cannot exercise jurisdiction over the crime of aggression in this context. That is because the jurisdictional regime set out in the Statute with respect to the crime of aggression differs from that relating to the other crimes over which the ICC has jurisdiction (more on this under question 4).

With regard to prosecution before domestic courts, the CAVV explains that the crimes committed in Ukraine can be prosecuted before Ukrainian courts. Other countries can also prosecute these crimes on the basis of the (active or passive) personality principle or the universality principle. The CAVV notes that several people have in fact been tried and convicted by Ukrainian courts for war

¹ CAVV, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report no. 40, 12 September 2022.

² 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.

crimes and acts of aggression committed in Ukraine, and that various other states have opened investigations. As in advisory report no. 40, the CAVV points out that there are differing views on the exercise of jurisdiction over the crime of aggression at national level in this way by countries other than the aggressor state. The CAVV recalls, however, that there are several grounds for the exercise of jurisdiction over international crimes, including the crime of aggression. In the Netherlands there is universal jurisdiction over the crime of aggression on the basis of the International Crimes Act, in so far as the suspect is present in the territory of the Netherlands.

Question 2: What are the various alternatives for prosecuting Russia's President Putin?

The CAVV states that the ICC can exercise jurisdiction over President Putin and points out that it has already issued a warrant for his arrest. The CAVV explains that it is not possible to claim immunity from the ICC's jurisdiction, and that in 2019 the ICC Appeals Chamber found that this rule is in line with customary international law and also applies to heads of states that are not a party to the Statute. The CAVV recalls that, in advisory report no. 40, it was not convinced of the existence of such a rule under customary international law, but viewed it unlikely that the ICC would reconsider its judgment.

Furthermore, the CAVV states that, in principle, President Putin cannot be prosecuted before the domestic courts of Ukraine or any other country while still in office. This is in line with the judgment of the International Court of Justice (ICJ) in the *Arrest Warrant* case, in which the ICJ held that incumbent heads of state, heads of government and foreign ministers enjoy absolute personal immunity from the criminal jurisdiction of other states, even where the prosecution concerns international crimes.

The CAVV suggests that this could change once Putin is no longer president because he will no longer enjoy personal immunity. The CAVV recalls that, in advisory report no. 43 from 2023, it argued that functional immunity for 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. However, in advisory report no. 40 the CAVV did note that the matter of universal jurisdiction over the crime of aggression is controversial. The CAVV states that, in any case, this *could* mean that after his term in office has ended President Putin will not be able to invoke functional immunity from prosecution before foreign courts.

Question 3: What is the possible added value or necessity of an alternative tribunal for the crime of aggression?

The CAVV considers that, although the ICC has already instituted proceedings for other international crimes committed in Ukraine, prosecution of the crime of aggression against Ukraine by an alternative tribunal would have significant added value. According to the CAVV, the establishment of such a tribunal would send the important message that the prohibition of the use of force, as laid down in article 2, paragraph 4 of the United Nations Charter ('UN Charter'), cannot be violated with impunity. Prosecution of the crime of aggression would also bring the aggressor to account for suffering that does not qualify as any other international crime. The CAVV gives the example of the suffering inflicted on Ukrainian fighters.

The CAVV states that it is aware that advocates of a special tribunal for prosecuting the crime of aggression against Ukraine are opening themselves to accusations of hypocrisy, given that previous alleged acts of aggression were not prosecuted in the past. However, the CAVV is of the view that the establishment of an aggression tribunal could pave the way for more consistent prosecution of acts of aggression, especially given that, as of 2010, there is a clear definition of aggression in article 8 *bis* of the Statute. The CAVV considers that the establishment of such a tribunal, in combination with amendment of the Statute, could set an important precedent.

The CAVV does not say anything about the exact form such an alternative tribunal might take. It points out, however, as it did in advisory report no. 40, that a 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 incumbent heads of state, heads of government and foreign ministers. But in the CAVV's view that does not change the fact that an alternative tribunal could prosecute other individuals who do not enjoy personal immunity.

Question 4: What is 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?

The CAVV explains that the jurisdictional regime of the ICC set out in the Statute with respect to the crime of aggression differs in several ways from that concerning other international crimes over which the ICC has jurisdiction. First of all, the third-party effect of the ICC's jurisdiction does not apply to the crime of aggression. The CAVV explains that the ICC has jurisdiction over the crime of aggression only when the defendants' home state is a party to the Statute and, therefore, *not* in cases in which the crime of aggression is committed by nationals of a state that is not a party to the Statute on the territory of a state that is a party to the Statute, which is the case for the other international crimes over which the ICC has jurisdiction. Secondly, article 15 *bis*, paragraph 4 of the Statute creates the possibility for States Parties to opt out of the ICC's jurisdiction over the crime of aggression. Thirdly, consultation with the UN Security Council is required before the Prosecutor can proceed with a *proprio motu* investigation (an investigation at their own initiative) into a situation of aggression.

The CAVV points out that the limited jurisdictional regime with respect to the crime of aggression has been the subject of debate since the war in Ukraine started. There have been proposals to bring the jurisdictional regime with respect to the crime of aggression in line with the regular regime set out in article 12 of the Statute, namely by eliminating the provision that precludes the third-party effect for non-States Parties. The CAVV considers such an expansion and harmonisation of the jurisdictional regime with respect to the crime of aggression advisable, noting that the ICC's mission to 'put an end to impunity for the perpetrators' of international crimes applies to *all* crimes over which the ICC has jurisdiction. According to the CAVV, changing the current limited jurisdictional regime is important in order to put an end to the crime of aggression's outlier status under the Statute and treat this crime on a par with war crimes, crimes against humanity and genocide. The CAVV believes that the usefulness and necessity of amending article 15 *bis* can therefore be found in the fact that this would put aggression on a par with other international crimes and end the disagreement over the current jurisdictional regime for aggression.

Question 5: 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?

The CAVV considers that supporting an initiative to establish a special tribunal for the crime of aggression should go hand in hand with supporting proposals to amend the current jurisdictional regime for aggression set out in the Statute (the 'two-track approach'). Taking such a two-track approach could address the criticisms described in advisory report no. 40 regarding the selective application of international law and the possibility that the establishment of a special aggression tribunal could undermine the ICC.

According to the CAVV, the establishment of a special aggression tribunal must be treated as an intermediate step, to fill the current gap and allow for the prosecution of such crimes pending the conferral of full jurisdiction on the ICC. The CAVV believes that the two-track approach would strengthen both the legitimacy of the special tribunal and the ICC, which is ultimately the most appropriate institution to prosecute and try the crime of aggression. Furthermore, the CAVV emphasises the importance of making agreements on cooperation and the division of tasks between an aggression tribunal and the ICC. Lastly, the CAVV points out that supporting the expansion of the ICC's jurisdictional regime could have as a consequence that there will be more instances in which the Statute could be applicable to Dutch public servants in the event that the Netherlands participates in military operations that cannot be qualified as self-defence within the meaning of the UN Charter or are not mandated by the UN Security Council.³

³ See CAVV advisory report no. 45, p. 10 and footnote 51.

3. Government response to the advisory report

3.1 Introduction

The government appreciates the CAVV's advisory report. The government notes that the report is in line with and builds upon previous CAVV reports on jurisdiction and immunities in the context of prosecuting the crime of aggression (no. 40) and on the draft articles of the International Law Commission on immunity of state officials from foreign criminal jurisdiction (no. 43). In the present response the government will therefore also build upon its responses to these two reports.⁴

3.2 Existing options for prosecuting the crime of aggression against Ukraine

The CAVV states that both the ICC and domestic courts can prosecute international crimes committed in the war between Russia and Ukraine, and that they are already doing so. However, it also notes that under the Statute the jurisdictional regime for the crime of aggression differs from and is more limited than that for other international crimes and that consequently the ICC cannot exercise jurisdiction over the crime of aggression against Ukraine. According to the CAVV, domestic courts can exercise jurisdiction over this crime on the basis – in Ukraine's case – of the territoriality principle and on the basis of the (active and passive) personality principle and the universality principle. The government agrees with these conclusions.

Although there are different grounds on which domestic courts can exercise jurisdiction over the crime of aggression, the government agrees with the CAVV that such jurisdiction is limited with regard to incumbent heads of state, heads of government and foreign ministers because they enjoy personal immunity. On this point, the government's position is in line with its previous remarks on personal immunity in domestic trials in its responses to CAVV advisory reports nos. 43 and 40.

Like the CAVV, the government further considers that the personal immunity of heads of state, heads of government and foreign ministers ceases to apply from the moment their term of office ends or if their home state waives immunity. Former heads of state, heads of government and foreign ministers do, however, enjoy functional immunity for acts carried out in an official capacity during their term of office. The CAVV notes that there is controversy about the matter of whether functional immunity applies to the crime of aggression. It concludes that, in any case, it *could* mean that once Putin's term of office ends he could be prosecuted before domestic courts for decisions that led to international crimes, including the crime of aggression. The government agrees with this conclusion. The government is of the view that functional immunity does not necessarily preclude criminal prosecution at national level for international crimes. This is also in line with what is said on this subject in the Explanatory Memorandum to the International Crimes Act.⁵ It should be noted in this regard that the final decision on this matter lies with the courts.

Lastly, the CAVV notes that, according to the judgment of the ICC Appeals Chamber in the *Al Bashir case*, it is not possible to claim immunity before the ICC, and this includes personal immunity for incumbent heads of state. The ICC itself considers that it can exercise jurisdiction over President Putin, which is apparent from the warrant of arrest issued against him. The government acknowledges that the ICC's interpretation on this is immutable for States Parties and brings with it obligations to work with the ICC in the arrest and surrender of suspects. At the same time it recognises that this can lead to a situation in which States Parties are subject to conflicting obligations under international law, because they are required under customary international law to respect the personal immunity of incumbent heads of state, heads of government and foreign ministers. This has also been recognised in the Explanatory Memorandum to the International Crimes Act, which points out that in such cases it will initially be up to the ICC to form an opinion on possible immunity and examine whether it can maintain its request to the state concerned.⁶ However, as already stated above, the ICC cannot exercise jurisdiction over President Putin or other Russian officials for the crime of aggression.

⁴ Parliamentary Papers, House of Representatives 2023/24, 36 410-V, nos. 13 and 20.

⁵ Parliamentary Papers, House of Representatives 2001/02, 28 337, no. 3, pp. 19-23.

⁶ Parliamentary Papers, House of Representatives 2001/02, 28 337, no. 3, p. 23.

3.3 Usefulness and necessity of a special tribunal for the crime of aggression

The CAVV sees a clear added value in a special tribunal for the crime of aggression. This is because, in the CAVV's view, the establishment of such a tribunal would reinforce the prohibition of the use of force by states in their international relations, as laid down in article 2, paragraph 4 of the UN Charter, and pave the way for more consistent prosecution of crimes of aggression and for amendment of the Statute (more on this in section 3.4). The government shares this view.

In its response to CAVV advisory report no. 40, the government described the ICC's inability to exercise jurisdiction over Russian aggression as 'a gap' with regard to the situation in Ukraine, and the government still sees it as such. To fill this gap, the Netherlands is working to explore other options for prosecuting the crime of aggression, in particular a special aggression tribunal. The Netherlands actively participates in discussions on the establishment of such a tribunal, which take place primarily among a core group of more than 30 countries. In the context of these discussions, the government has expressed its willingness to host a future tribunal for the crime of aggression, provided that: (a) there is broad international political and financial support for its establishment, (b) it will not undermine the work of the ICC, and (c) there is sufficient capacity and sufficient funding for the Netherlands as host state to accommodate such a tribunal.

The CAVV further remarks that, under current international law, personal immunity presents an obstacle to prosecuting President Putin before a special aggression tribunal. In that regard, the government maintains its position that, for tribunals other than the ICC to set aside personal immunity, they must have sufficient support from the international community.⁷

Lastly, the CAVV states that for the sake of the integrity and credibility of international law the Netherlands must press – now and in the future – for prosecution of the crime of aggression, even if the aggressor is an ally. The government agrees with this and underscores that serious and large-scale human rights violations and international crimes such as aggression, war crimes, crimes against humanity and genocide must not go unpunished, regardless of where they occur and who commits them. The government notes that the Netherlands' efforts in support of Ukraine fit within the Netherlands' wider policy of promoting *accountability* for international crimes worldwide.⁸ By calling for accountability for the most serious violations of international law and fighting impunity, the Netherlands is helping ensure the effective functioning of the international legal order, respect for human rights and justice for victims. The government also believes that the Netherlands – as host state of various international courts and tribunals in The Hague, the city of peace and justice – has taken on a special role that is accompanied by certain responsibilities.

3.4 Two-track approach and the consequences for the international legal order of the establishment of a special tribunal for the crime of aggression

The CAVV considers the amendment and expansion of the jurisdictional regime with respect to the crime of aggression set out in article 15 *bis* of the Statute desirable for the purpose of strengthening the ICC's mandate and putting the crime of aggression on a par with other international crimes. According to the CAVV, the initiative to establish a special tribunal for crimes of aggression against Ukraine could have a positive effect on the international legal order and, in particular, on the functioning of the ICC, as long as it is accompanied by support for proposals to amend the Statute to this effect. This is referred to as the 'two-track approach'. The government understands this reasoning.

The government would again stress that the usefulness and necessity of establishing a special tribunal for the crime of aggression lies in filling the existing gap in the situation concerning Ukraine resulting from the ICC's inability to exercise jurisdiction. In addition, the government emphasises that, since the start of negotiations on the Statute in the 1990s, the Netherlands has shown support for conferring on the ICC the same jurisdiction over the crime of aggression as

⁷ See the government response to CAVV advisory report no. 40, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Parliamentary Papers, House of Representatives 2023/24, 36 410-V no. 13, p. 8.

⁸ See the policy document 'Human rights – Democracy – the International Legal Order', annexe to the letter to parliament from the Minister of Foreign Affairs and the Minister for Foreign Trade and Development Cooperation dated 30 June 2023, Parliamentary Papers, House of Representatives 2022/23, 32 735, no. 370.

over the other three international crimes covered by the Statute. The government continues to express this position, which has not changed, in bilateral and multilateral relations.

The government notes that, with a view to the Review Conference that will be held in 2025,⁹ the matter of amending article 15 *bis* of the Statute will be a topic of discussion in various forums in the coming months.¹⁰ Germany has taken initiative in this regard by establishing the Group of Friends for the Strengthening of the ICC's Jurisdiction over the Crime of Aggression. The Netherlands participates in this group, in line with its consistent position referred to above on the ICC's jurisdictional regime for the crime of aggression. For the government, this Group of Friends offers the opportunity to gain an understanding of the international dynamics at play with regard to the possible amendment of article 15 *bis* of the Statute.

4. Conclusion

The government appreciates the CAVV's thorough analysis of the long-term consequences of establishing an alternative tribunal for prosecuting the crime of aggression. In addition to what the CAVV stated in advisory report no. 40, this analysis provides further clarification and details on the framework of the Netherlands' efforts with regard to prosecuting and trying the crime of aggression. For example, the CAVV sees obvious added value in the establishment of a special tribunal for the crime of aggression, which it believes could have a positive effect on the international legal order. The government understands this as support for the active role that the Netherlands has been playing in the discussion on the establishment of such a tribunal.

At the same time, the report offers guidance for further development of ideas on the position of such a tribunal within the international legal order and, in particular, the effects that it is expected to have on the functioning of the ICC. The CAVV stresses that the establishment of a special tribunal for the crime of aggression could, in particular, have a positive effect on the functioning of the ICC if it is accompanied by support for proposals to expand the jurisdictional regime with respect to the crime of aggression set out in the Statute. This is in line with the existing and consistent position that the Netherlands maintains in favour of conferring on the ICC jurisdiction over the crime of aggression so that this crime is on a par with the other three international crimes covered by the Statute.

⁹ At the Kampala Review Conference in 2010, states decided to review the amendments on the crime of aggression seven years after the beginning of the ICC's exercise of jurisdiction over that crime. The ICC has exercised jurisdiction over the crime of aggression since 2018, meaning that article 15 *bis* will be reviewed in 2025. See paragraph 4 of Resolution RC/Res.6 (2010).

¹⁰ See also the recent answers to questions from MP Ruben Brekelmans to the Minister of Foreign Affairs and the Minister of Justice and Security concerning the letter to parliament on input for the annual meeting of the Assembly of States Parties to the Rome Statute, Parliamentary Papers, House of Representatives 2023/24, 1212, Annexe to the Proceedings.