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van Alebeek, R.; van den Herik, L.; Ryngaert, C.

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Guest Editorial



Prosecuting Russian Officials for the Crime of Aggression: What About Immunities?

1 Introduction

In the face of Russia's aggression against Ukraine, the institutions of the Council of Europe (CoE, Council) have not remained silent. Most conspicuously, on 16 March 2022, its Committee of Ministers decided to terminate Russia's membership of the Council, in accordance with Article 8 of the Council's Statute.¹ Russia thereupon ceased to be a party to the European Convention on Human Rights (ECHR) on 16 September 2022.² Russia's actions in Ukraine have also led the Committee of Ministers to plan the organisation of a Summit of the Heads of State and Government, to be held in Reykjavik in May 2023.³ This Summit⁴ is only the fourth CoE Summit ever held,⁵ and is

- 1 Committee of Ministers, 'Consequences of the Aggression of the Russian Federation Against Ukraine' (16 March 2022) CM/Del/Dec(2022)1428ter/2.3.
- 2 ECtHR, 'The Russian Federation Ceases to be a Party to the European Convention on Human Rights' (16 September 2022) ECHR 286(2022): <<https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights>>. The ECtHR, however, continues to have jurisdiction over applications filed against Russia concerning actions or omissions occurring up until that date. On 28 February 2023, 16,700 applications against Russia were pending before the Court. See: <https://www.echr.coe.int/Documents/Stats_pending_month_2023_BIL.PDF>.
- 3 Committee of Ministers, '4th Summit of Heads of State and Government of the Council of Europe' (7 November 2022) CM/Del/Dec(2022)1447bis/1.2.
- 4 The ground for this summit was prepared by a High-Level Reflection Group established by the Secretary-General of the Council of Europe. See, Council of Europe, 'Report of the High-Level Reflection Group of the Council of Europe' (October 2022): <<https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf>>.
- 5 The other Summits were held in, respectively, 1993, 1997, and 2005.

aimed at ‘renewing the conscience of Europe’ in response to the challenges raised by the war in Ukraine.⁶ The Parliamentary Assembly of the Council of Europe (PACE, Parliamentary Assembly), for its part, has taken the lead in promoting accountability for serious violations of international humanitarian law and other international crimes committed in Ukraine.⁷ This is the subject of our editorial.

In a resolution adopted in April 2022,⁸ based on a report by the PACE Committee on Legal Affairs and Human Rights,⁹ the Parliamentary Assembly called, *inter alia*, on all member and observer states of the Council of Europe to:

urgently set up an *ad hoc* international criminal tribunal, which should: receive a mandate to investigate and prosecute the crime of aggression allegedly committed by the political and military leadership of the Russian Federation;

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 ICC Statute;

have the power to issue international arrest warrants and not be limited by State immunity or the immunity of heads of State and government and other State officials;

be set up notably by a group of like-minded States in the form of a multi-lateral treaty endorsed by the United Nations General Assembly and with support to be provided by the Council of Europe, the European Union and other international organisations;

6 Council of Europe, ‘Summit in Reykjavik to Renew ‘the Conscience of Europe’ (7 November 2022): <<https://www.coe.int/en/web/portal/-/summit-in-reykjavik-to-renew-the-conscience-of-europe->>.

7 For an overview of accountability initiatives by other international organisations and actors, see, O Corten and V Koutoulis, ‘Tribunal for the Crime of Aggression Against Ukraine – A Legal Assessment’ (European Parliament of the European Union, December 2022): <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf)> 1–3.

8 Parliamentary Assembly of the Council of Europe, ‘The Russian Federation’s Aggression Against Ukraine: Ensuring Accountability for Serious Violations of International Humanitarian Law and Other International Crimes’ (28 April 2022) Resolution 2436(2022). On 26 January 2023, the Assembly adopted another Resolution addressing the issue: Parliamentary Assembly of the Council of Europe, ‘Legal and Human Rights Aspects of the Russian Federation’s Aggression Against Ukraine’ (26 January 2023) Resolution 2482(2023) para 7.

9 Parliamentary Assembly of the Council of Europe, ‘The Russian Federation’s Aggression Against Ukraine: Ensuring Accountability for Serious Violations of International Humanitarian Law and Other International Crimes’ (26 April 2022) Doc 15510.

have its headquarters in Strasbourg (France), in view of possible synergies with the European Court of Human Rights, which is dealing with numerous related individual and interstate applications.¹⁰

A separate international criminal tribunal for aggression has added value. The International Criminal Court (ICC) has jurisdiction over war crimes, genocide, and crimes against humanity committed in the context of the war.¹¹ However, the ICC has no jurisdiction over Russia's aggression, even if, in principle, aggression falls within the ICC's jurisdiction.¹² This is so, because the ICC's jurisdictional regime for aggression is more restrictive than for the other crimes. Under the ICC Statute, '[i]n 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.'¹³ Hence, it is also necessary that the state of nationality of the perpetrators is a party to the Statute. Russia is not a party to the ICC Statute. Accordingly, the ICC cannot exercise its jurisdiction over Russia's aggression against Ukraine, regardless of whether Ukraine has accepted the jurisdiction of the ICC. And while this prohibition does not apply when the United Nations Security Council (UNSC) has referred a situation to the Prosecutor,¹⁴ Russia's veto power within the UNSC rules out this option.

On 30 November 2022, the European Union (EU), via its Commission President, Ursula von der Leyen, also proposed 'to set up a specialised court,

¹⁰ Resolution 2436(2022) (n 8) para 11.6.

¹¹ Ukraine lodged declarations on 9 April 2014 and 8 September 2015 under Article 12(3) of the Statute, accepting the exercise of jurisdiction of the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date. In addition, thirty-nine ICC states parties referred the situation in Ukraine to the ICC. Thereupon, 'the Prosecutor announced he had proceeded to open an investigation into the Situation in Ukraine on the basis of the referrals received. In accordance with the overall jurisdictional parameters conferred through these referrals, and without prejudice to the focus of the investigation, the scope of the situation encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards' (ICC, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (2 March 2022): <<https://www.icc-cpi.int/ukraine>>). The ICC can exercise delegated territorial jurisdiction over crimes committed on the territory of Ukraine, including by persons of non-states parties, under the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 Article 12(2).

¹² Rome Statute (n 11) Article 5(d).

¹³ Ibid Article 15*bis*(5).

¹⁴ Ibid Article 15*ter*.

backed by the United Nations, to investigate and prosecute Russia's crime of aggression', and declared itself 'ready to start working with the international community to get the broadest international support possible for this specialised court'.¹⁵ The Dutch Foreign Minister signalled the Dutch Government's willingness to host the court in the Netherlands. Germany and the UK have expressed support for an internationalised or hybrid tribunal.¹⁶ In a Joint Statement following the 24th EU-Ukraine Summit, Charles Michel, President of the European Council, Ursula von der Leyen, President of the European Commission, and Volodymyr Zelenskyy, President of Ukraine, expressed support for the development of an international centre for the prosecution of the crime of aggression in Ukraine (ICPA) in The Hague, with the objective to coordinate investigation of the crime of aggression against Ukraine, and to preserve and store evidence for future trials.¹⁷ These developments make the establishment of a special court to try individuals for the crime of aggression committed against Ukraine a distinct possibility, even though the precise form is not yet fully clear.

Aggression is a leadership crime. This means that a crime of aggression can only be committed by persons representing the state at the highest level. Accordingly, it is the expectation that the prosecutor of such a court will seek to indict Russia's highest civilian and military leaders, including President Vladimir Putin and Foreign Minister Sergey Lavrov.¹⁸ The vexed question then arises whether these persons could invoke immunity from the jurisdiction of the special court, and if so whether that would then render the court pointless right from the start.

The Dutch Advisory Committee on Public International Law (CAVV) has addressed a number of issues of jurisdiction and immunity over the crime

15 European Commission, 'Statement by President von der Leyen on Russian Accountability and the Use of Russian Frozen Assets' (30 November 2022): <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_7307>.

16 A Baerbock, 'Strengthening International Law in Times of Crisis' (The Hague Peace Palace, 16 January 2023): <<https://www.auswaertiges-amt.de/en/newsroom/news/strengthening-international-law-in-times-of-crisis/2573492>>; United Kingdom Government, 'UK Joins Core Group Dedicated to Achieving Accountability for Russia's Aggression Against Ukraine' (23 January 2023): <<https://www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine>>.

17 C Michel, U von der Leyen, and V Zelenskyy, 'Joint Statement Following the 24th EU-Ukraine Summit' (Council of the European Union, 3 February 2023): <<https://www.consilium.europa.eu/en/press/press-releases/2023/02/03/joint-statement-following-the-24th-eu-ukraine-summit/>>.

18 As well as possibly the leaders of other states, like Belarus, for their role and complicity in the war of aggression. See, Resolution 2482(2023) (n 8) para 7.1.

of aggression in an advisory report presented to the Dutch Government on 12 September 2022.¹⁹ The authors of this guest editorial are CAVV members and have taken the lead in drafting the report.²⁰ In this editorial, we present, and elaborate on the main arguments of the CAVV advisory report, specifically regarding immunity. We do so in our personal, academic capacity, and we refer to the authoritative CAVV advisory report for the official position of the CAVV as such.

The structure of this editorial is as follows. First, we briefly elaborate on the role of the CAVV, which has a rather specific mandate as an advisory body to the Dutch Government. Second, we discuss the question of immunity before international tribunals, such as a tribunal for the crime of aggression. We make three points in this regard:

- Only heads of state, heads of government, and ministers of foreign affairs enjoy the personal immunity from foreign criminal jurisdiction that was at issue in the ICJ's *Arrest Warrant* judgment.²¹ Such immunity extends to both official and private acts, and is based on the need to ensure the effective performance of the office-holder's functions. This personal immunity persists in relation to states which are not parties to statutes of international criminal tribunals. Immunity will not apply if the tribunal is established by the UNSC given the special powers of this organ. Immunity continues to apply before other international criminal tribunals, but, going forward, states may back the development of a rule that considers personal immunity irrelevant before distinct international criminal tribunals.
- Ad hoc immunity of state officials abroad on official visits may also hamper the successful exercise of jurisdiction as it blocks arrest and surrender to international criminal tribunals.
- Functional immunity, which accrues to all state officials in relation to their official acts, is no longer an obstacle to a person's prosecution for aggression before an international criminal tribunal (or before a national court for that matter).

19 The Advisory Report has been translated into English: CAVV, 'Challenges in Prosecuting the Crime of Aggression: Jurisdiction and Immunities' (12 September 2022): <<https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/09/12/challenges-in-prosecuting-the-crime-of-aggression-jurisdiction-and-immunities>>.

20 This editorial is written in personal, academic capacity. All errors are the authors' responsibility. The editorial does not represent an official CAVV opinion. The Advisory Report, as published on 12 September 2022 and as referenced in the previous footnote, is the only official and authoritative publication on this matter by the CAVV.

21 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3.

Third, we discuss how personal and functional immunity under international law relates to the right of access to a court and the obligation to prosecute, and more specifically how the European Court of Human Rights (ECtHR, Court) is likely to balance personal and functional immunity in relation to the crime of aggression with Convention rights.

2 The Role of the Dutch Advisory Committee on Public International Law

The CAVV is an independent body that advises the Dutch government, the Senate, and the House of Representatives of the Netherlands on international law issues.²² It produces advisory reports on request and – although more rarely – on its own initiative (*proprio motu*). The CAVV authored its opinion on jurisdiction and immunities in relation to aggression *proprio motu*.

In terms of substance, the CAVV provides the Dutch Government with advice on the work of the United Nations International Law Commission (ILC), such as on the ILC's current work on the immunity of state officials from foreign criminal jurisdiction. It also advises the Government on other issues of international law, such as, recently, the legality of non-lethal assistance to rebel groups, the regulation of autonomous weapon systems, and use of the term 'genocide' by politicians. Some of these advisory reports are co-authored with the Dutch Advisory Council on International Affairs.²³

The CAVV is not an organ of the Dutch Government. Accordingly, its advisory reports cannot be attributed to the Dutch Government. They do not constitute state practice in the sense of Article 38(1)(b) of the Statute of the International Court of Justice (ICJ).²⁴ Obviously, CAVV reports can *inform* the practice of the Dutch Government. Specifically, the Dutch Government has a legal obligation to inform parliament about its position on an advisory report within a period

22 The CAVV, in its current form, was established, pursuant to the Advisory Bodies Framework Act (Bulletin of Acts and Decrees 1996, 378), by the Advisory Committee on International Public Law Act of 1 January 1998 (Bulletin of Acts and Decrees 1998, 219). Earlier iterations of the CAVV have been active since 1920, however. See: <<https://www.advisorycommitteeininternationalallaw.nl/about-the-cavv/history>>.

23 <<https://www.advisorycouncilinternationalaffairs.nl/>>.

24 CAVV opinions could potentially qualify as 'teachings of the most highly qualified publicists [...] as subsidiary means for the determination of rules of law', pursuant to the Statute of the International Court of Justice (adopted 24 October 1945, entered into force 24 October 1945) Article 38(1)(d), annexed to the Charter of the United Nations (1945).

of three months upon receipt of the report.²⁵ The CAVV can thus invite the Government to take a position on a certain issue. That government position does count as state practice.²⁶

3 Immunity Before an International Tribunal for the Crime of Aggression

3.1 *Personal Immunity*

As regards personal immunity, the starting point of our analysis is the *Arrest Warrant* judgment of the ICJ. In *Arrest Warrant*, the ICJ held that the ‘troika’ of incumbent heads of state, heads of government, and foreign ministers enjoy personal immunity from the criminal jurisdiction of foreign states, also in respect of international crimes.²⁷ This holding is also supported by the ILC in its Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction Adopted on First Reading (2022).²⁸ The ILC considered that the purpose of this immunity is ‘to protect the sovereign equality of States and to guarantee that the persons enjoying this type of immunity can perform their functions of representation of the State unimpeded throughout their term of office’, and thus that ‘there is no need for further clarification regarding the applicability of immunity *ratione personae* to the acts performed by such persons throughout their term of office,’²⁹ such as acts qualifying as international crimes. We agree with this analysis.

The ICJ in *Arrest Warrant* did not exclude that other high-ranking representatives of the state might also enjoy immunity.³⁰ While there is indeed some domestic case law extending personal immunity to persons other than

25 Compare, Article 24 of the Advisory Bodies Framework Act of 3 July 1996 (Bulletin of Acts and Decrees 1996, 378).

26 In relation to the Advisory Report that is being discussed in this editorial, the Minister of Foreign Affairs has notified the chairperson of the House of Representatives of a delay for the reaction in a letter of 8 December 2022.

27 *Arrest Warrant* (n 21) paras 53–54.

28 United Nations General Assembly, ‘Report of the International Law Commission’ (12 August 2022) A/77/10, Chapter VI Article 3 (‘Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction’) and Article 4.2 (‘Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office’).

29 *Ibid* Commentary to Article 4, para 11.

30 *Arrest Warrant* (n 21) paras 53–54.

those belonging to the troika, in particular ministers of defense,³¹ we are of the opinion that the rationales underlying this extensive immunity do not support such an extension. Only the members of the troika embody and represent the state in international relations ‘solely by virtue of [their] office’.³² This means that suspects of the crime of aggression other than those belonging to the troika can only avail themselves of ad hoc immunity when abroad on official visits.³³

The key question is whether personal immunities also block prosecution before an *international court*. Two issues have to be distinguished here. First, can the members of the troika avail themselves of personal immunity in a procedure before an international court? And, second, can high-level officials avail themselves of ad hoc immunity to fend off arrest and surrender to an international court when abroad on official visits? Furthermore, the notion of ‘international court’ deserves closer scrutiny.

In respect of the personal immunity of the troika, in *Arrest Warrant*, the ICJ observed in an *obiter dictum* that personal immunity does not apply if the person is prosecuted during or after their term of office before ‘certain international criminal courts, where they have jurisdiction’.³⁴ The ICJ referred in particular to the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R), as well as to the ICC.³⁵ The reference to the ICC triggered a heated debate. Unlike the ICTY/R, the ICC is not established through a Security Council Resolution adopted under Chapter VII of the UN Charter, but through a treaty concluded between states. The states parties to the Rome Statute can clearly be assumed to have waived the immunity of their own officials.³⁶ Yet, in view of the generally accepted principle of international law that treaties cannot create obligations (or take away rights) of third states,³⁷ it is not immediately clear how a treaty between a group of states can set aside the immunity

31 *Re Mofaz*, first instance, unreported decision (Bow Street Magistrates’ Court, 12 February 2004) ILDC 97 (UK 2004); Switzerland, Swiss Federal Criminal Court, 25 July 2012, *Nezzar*, TPF BB 2011 140, para 5.4.2.

32 *Arrest Warrant* (n 21) para 53.

33 Convention on Special Missions (adopted 8 December 1969, entered into force 21 June 1985) 1400 UNTS 231. On this point, see also, M Wood, ‘The Immunity of Official Visitors’ (2012) 16 *Max Planck Yearbook of International Law* 35. See also, para 3.2 below on functional immunity.

34 *Arrest Warrant* (n 21) para 61.

35 *Ibid.*

36 Rome Statute (n 11) Article 27.2.

37 *Pacta tertiis nec nocent nec prosunt*, or the relative effect of treaties, as codified in Article 34 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

of states which are not parties, unless the Security Council refers a situation to the prosecutor (and preferably sets aside immunity).³⁸

The ICC itself entertained the question in a series of decisions related to the prosecution of Omar Al-Bashir, the head of state of non-party state Sudan. The Appeals Chamber ruled in the 2019 *Judgment in the Jordan referral re Al-Bashir Appeal* that Article 27.2 ICC Statute ‘reflects the status of customary international law’.³⁹ The *ratio decidendi* of the judgment is slightly fuzzy, but it is safe to say that the reasoning of the Appeals Chamber pivots on the finding that international courts have a ‘different character’ compared to national courts since they ‘act on behalf of the international community as a whole’.⁴⁰ This reasoning is reflective of that of the Special Court for Sierra Leone (SCSL), which earlier exercised jurisdiction over Charles Taylor, the then president of Liberia, not a party to the agreement establishing the Court, on the grounds that the court was a ‘truly international’ tribunal deriving its mandate from the international community.⁴¹ ‘Accordingly’, the Appeals Chamber of the ICC continued, ‘the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court.’⁴² Due to this different character, the Appeals Chamber was of the opinion that it is not the exception to personal immunity before international courts that has to be proven, but instead that the rule of personal immunity from the jurisdiction of international courts needs to be established.⁴³ In other words, the Appeals Chamber reversed the burden of proof and concluded ‘that there is neither State practice

38 Rome Statute (n 11) Article 13(b) and – specifically concerning aggression – Article 15ter.

39 *Judgment in the Jordan Referral re Al-Bashir Appeal* (Judgment) ICC-02/05-01/09-397-Corr (6 May 2019) para 103.

40 Ibid para 115.

41 *Prosecutor v Taylor* (Decision on Immunity from Jurisdiction) Special Court for Sierra Leone (Appeals Chamber) SCSL-2003-01-AR72(E) (31 May 2004) paras 38 and 51. Unlike the ICC, the SCSL was not established on the basis of a multilateral treaty between states, but on the basis of a bilateral agreement concluded between the UN and Sierra Leone (Freetown, 16 January 2002). The UNSC had requested the Secretary-General to negotiate such an agreement (UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315(2000)). Note, however, that the UNSC could not as such trigger the jurisdiction of the SCSL. This is different for the ICC: pursuant to the Rome Statute (n 11) Article 13(b), the ICC may exercise its jurisdiction if ‘[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.’

42 *Jordan Referral re Al-Bashir Appeal* (n 39) para 115.

43 Ibid para 116.

nor *opinio juris* that would support the existence of Head of State immunity under customary law *vis-à-vis* an international court'.⁴⁴

We note, however that these decisions are controversial.⁴⁵ It is unnecessary to revisit the many arguments that have been advanced critiquing or supporting the decisions, which have been extensively discussed elsewhere.⁴⁶ We limit ourselves to a summary of the principal arguments that convinced us to side with the critics. First, the reliance on the different character of international courts overlooks that the rationale of personal immunity rules is not merely *par in parem non habet imperium*, but rather the need to ensure the effective performance of the functions of the troika. The ICJ explained in *Arrest Warrant* that:

if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to

44 Ibid para 113.

45 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): <<https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/>>, 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): <<https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/>>.

46 See, for example, *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Written Observations of Professor Claus Kreß as Amicus Curiae, with the Assistance of Ms Erin Pobjie, on the Merits of the Legal Questions Presented in 'The Hashemite Kingdom of Jordan's Appeal Against the "Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir" of 12 March 2018 (ICC-02/05-01/09-326)) ICC-02/05-01/09-359 (18 June 2018). See also, *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Observations by Professor Roger O'Keefe, Pursuant to Rule 103 of the Rules of Procedure and Evidence, on the Merits of the Legal Questions Presented in 'The Hashemite Kingdom of Jordan's Appeal Against the "Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir"' of 12 March 2018 (ICC-02/05-01/09-326)) ICC-02/05-01/09 (18 June 2018); D Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333; D Akande, 'The Immunity of Heads of States of Nonparties in the Early Years of the ICC' (2018) 112 *American Journal of International Law Unbound* 172; SMH Nouwen, 'Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court-Exceptionalism Regarding Personal Immunities' (2009) 78(3) *Cambridge Law Journal* 596; KJ Heller, 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis' (2022) *Journal of Genocide Research*.

the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an “official” visit or a “private” visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an “official” capacity or a “private” capacity.⁴⁷

We believe the ICJ would add to that in a relevant case: ‘regardless of whether the arrest was performed on request of an international court or a national court’. We therefore disagree with the reversal of the burden of proof. The development of an exception to personal immunity before international courts is certainly possible – more on that below – but such an exception has to be developed through the actual practice of states.⁴⁸ We doubt whether, at this moment in time, there is sufficient evidence of a sufficiently widespread and representative state practice that points to the existence of a norm of customary international law pursuant to which personal immunity no longer applies in respect of international courts. There is little, if any, physical or verbal state practice that confirms the existence of such a norm. In fact, the Appeals Chamber disregarded the practice of the African Union, with its 55 member states, which has consistently objected to the exercise of jurisdiction by the ICC over Al-Bashir.⁴⁹ Also of note is that the Malabo Protocol, which expands the jurisdiction of the African Court of Justice and Human Rights to include prosecutions for a number of international crimes, continues to apply personal immunity – even if the Protocol has not yet entered into force this practice is not fully irrelevant.⁵⁰ In addition, the Appeals Chamber disregarded

47 *Arrest Warrant* (n 21) para 55.

48 We refer in this respect to the ILC’s draft conclusion 8 on the identification of customary international law, which notes that ‘[t]he relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent’ (United Nations, ‘Report of the Commission to the General Assembly on the Work of its Seventieth Session’ (2018) II(2) *Yearbook of the International Law Commission*, para 51, conclusion 8).

49 See, for example, *The Prosecutor v Omar Hassan Ahmad Al Bashir* (The African Union’s Submission in ‘The Hashemite Kingdom of Jordan’s Appeal Against the “Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir” of 12 March 2018 (ICC-02/05-01/09-326) ICC-02/05-01/09-370-Anx1 (18 June 2018).

50 Protocol on Amendments to the Statute of the African Court of Justice and Human Rights: <https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf>. Article 46*Abis* provides: ‘No charges shall be commenced or continued against any serving AU Head of State or Government, or anybody acting or

the fact that states outside Africa also did not arrest Al Bashir when visiting.⁵¹ Finally, it remains unclear precisely for what kind of ‘international court’ a new rule regarding irrelevance of personal immunity would apply. When can a court be said to represent the international community of states as a whole? When two states establish a court by treaty, they have created an international court, but clearly not one that represents the international community. For the argument to work (either as a controlling notion of a newly to develop customary exception, or, as the ICC proposed, as a notion automatically rendering personal immunity inapplicable), it needs to be accompanied by workable parameters that set ‘truly’ international courts apart from national courts, *and* from international courts that only represent a subgroup of states. In this regard, we think that the writings of Claus Kreß may provide guidance, and specifically the notion of an ‘international criminal court with a credible universal orientation’. A credible universal orientation requires, according to Kreß, that a court must, ‘through the process of its creation, its institutional design and its acceptance within the international community, be sufficiently distanced from one or a few national States and even an entire regional group of States.’⁵² It is important, however, that – in addition to scholars – states also explicitly take a position on what counts as an international court for which no personal immunity applies, beyond an international court that has been established with the consent of the suspect’s home state or that has a Chapter VII basis.

We recognise that like-minded states from a specific region (e.g., belonging to the Council of Europe or the EU) can set up a tribunal to try the crime of aggression, on the grounds that each of them has universal jurisdiction over aggression – even if that is not an uncontroversial proposition given the difference of views that exists on the question of jurisdiction, as also set out in the CAVV advisory report.⁵³ However, we consider it particularly problematic for states to delegate a power to an international tribunal for the crime of aggression that they themselves do not have, namely the power to disregard personal immunity. In this respect, it is of no moment that an international tribunal for the crime of aggression is independent from its constitutive member states or that it is a court of law imbued with judicial independence. Moreover, the assertion that an international tribunal exercises the international community’s *jus*

entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.’

51 See, for example: <<https://nubareports.org/bashir-travels/>>.

52 C Kreß, ‘Article 98’, in *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, K Ambos (ed), (4th edn, Beck/Hart/Nomos 2022) 2585, 2647.

53 CAVV (n 19) 7–9.

puniendi requires further substantiation to have any pertinent legal effect.⁵⁴ Hence, unless a tribunal is established by the UNSC pursuant to its Chapter VII powers, only a theory of delegation of powers can sufficiently account for the establishment of an ad hoc tribunal; and a state cannot delegate powers that it does not have in the first place.

The CAVV Advisory Report did not address the second issue regarding ad hoc immunity, since this type of immunity only applies in relation to the jurisdiction of the receiving state and hence does not directly preclude the exercise of jurisdiction by an international court. The immunity may, however, hinder the effective exercise of that jurisdiction as it may preclude arrest and surrender to the international court of indicted Russian officials abroad on official business. The Appeals Chamber in *Al-Bashir* was adamant; personal immunity does also not apply in horizontal relations when the jurisdiction was exercised to arrest and surrender an individual to the ICC.⁵⁵ However, the reasoning on this point is ambiguous as the Court appears to *also* support its position by arguing that, per UN Security Council Resolution 1593, the cooperation regime that applies to Sudan is that for states parties to the Rome Statute.⁵⁶ It has been argued that, in fact, the Appeals Chamber's reasoning in support of the absence of personal immunity in horizontal relations must be understood as requiring a Security Council resolution.⁵⁷ We think that this reading of the judgment is reasonable, and would like to add that, preferably, such a resolution also explicitly sets aside immunities or provides for an obligation to cooperate for all UN member states.

Summing up, this means that, presuming that Russia will not become a party to the Statute of an ad hoc tribunal for the crime of aggression, and presuming that Russia will veto any attempt to establish such a tribunal via the UN Security Council, and as long as the Russian people do not decide to change leadership, Russian President Putin, Prime Minister Mishustin, and Foreign Minister Lavrov will enjoy personal immunity before a tribunal not established by the UNSC. Other individuals fulfilling the leadership-criterion may invoke

54 These are among the key arguments advanced by former ICC President, C Eboe-Osuji. See, C Eboe-Osuji, 'The Absolute Clarity of International Legal Practice's Rejection of Immunity Before International Criminal Courts' (Just Security, 8 December 2022): <<https://www.justsecurity.org/84416/the-absolute-clarity-of-international-legal-practices-rejection-of-immunity-before-international-criminal-courts/>>.

55 *Jordan Referral re Al-Bashir Appeal* (n 39) paras 127–131.

56 *Ibid* paras 133–149.

57 See, Nouwen (n 46) 605–607; AS Galand, 'A Hidden Reading of the ICC Appeals Chamber's Judgment in the Jordan Referral Re Al-Bashir' (EJIL: Talk!, 6 June 2019): <<https://www.ejiltalk.org/a-hidden-reading-of-the-icc-appeals-chambers-judgment-in-the-jordan-referral-re-al-bashir/>>.

personal immunity when authorities of other states attempt to arrest them with a view to surrendering to an international criminal court only when they are on an official visit abroad.

We are nevertheless cognisant that the content of international law may shift. States' thirst for international accountability, possibly triggered by Russia's blatant violation of international law, may well translate into explicit support for a norm on the irrelevance of personal immunity before international criminal tribunals. It remains key, however, that the participation of states in the establishment of an ad hoc or hybrid tribunal to prosecute those responsible for the Russian aggression, or expressions of support, are sufficiently widespread and representative. In the first place, as noted above, for a rule of customary international law to change, that change needs to be supported by widespread, representative, and consistent state practice. And, secondly, *should* international law develop towards an exception to personal immunity before international courts, we strongly believe that such a rule should be limited to international courts that can truly be said to represent the international community as a whole, hence international courts with a credible universal orientation. It is not excluded that a hybrid court can be regarded as an international court with a credible universal orientation. It is essential, however, that states take explicit positions on this point. Ideally, this would be done via a widely supported UN General Assembly resolution endorsing both the establishment of an aggression tribunal for Ukraine and the rejection of personal immunity for that tribunal.⁵⁸ Personal immunity rules promote important values and interests of the international community and exceptions should be designed in a way so as to prevent abuse of process as far as possible. Hence, the exception should apply only to courts or tribunals that can be seen to truly represent a large majority of states representing all major regions of the world.

58 The Uniting for Peace Resolution (United Nations General Assembly Res 377 A (V) (3 November 1950) UN Doc A/RES/377) allows the General Assembly to assume its responsibility if the UNSC fails to exercise its primary responsibility for the maintenance of international peace and security. The General Assembly does not have enforcement powers like the UNSC though and hence it cannot create jurisdiction where there is none, nor can it – on its own – remove immunities where they normally apply. It can therefore only *endorse* a tribunal that is established by different means. General Assembly Resolutions can also provide evidence for the emergence of a new rule of customary international law on the absence of personal immunity for specific types of international criminal tribunals, for instance those with a credible universal orientation. Compare, United Nations, 'ILC Draft Conclusions on Identification of Customary International Law' (2018) 11(2) *Yearbook of the International Law Commission*.

3.2 *Functional Immunity Before an International Tribunal for the Crime of Aggression*

Beyond the troika, Russian leadership responsible for the crime of aggression may attempt to rely on functional immunity to fend off foreign or international prosecution. We are of the opinion that these claims do not have to be recognised. Functional immunity exempts acts performed in an official capacity from foreign jurisdiction. It accrues to all current and former state officials. There is ample state practice that shows that the rule does not preclude the exercise of jurisdiction by an international court.

Despite the Nuremberg mantra that the states that established the Tribunal were doing ‘together what any one of them might have done singly’,⁵⁹ functional immunity became a vexed issue when states finally started using universal jurisdiction more widely in the 1990s. In view of the controversy, the ILC started work on the topic of the immunity of state officials from foreign criminal jurisdiction. Draft Article 7, adopted on first reading in 2022, provides that functional immunity does not apply for six international crimes: genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearances.⁶⁰ The adoption of the draft Article was, however, shrouded in controversy. Both the ILC deliberations and the accompanying commentary make clear 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. The comments of states in the Sixth Committee of the UN General Assembly are also divided on this point.⁶¹

There are good arguments for saying that functional immunity from criminal jurisdiction does not apply to international crimes. However, at the same time, it cannot be denied that a substantial number of states oppose this reading of the rule. Yet, whatever the exact status of the exception to functional immunity for international crimes, states have in any case considerable leeway to apply the rule as they see fit, as 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

59 *Judgment of the Nuremberg International Military Tribunal 1946* (1946) 41 AJIL 172, 216.

60 A/77/10 (n 28) 190–191.

61 See, R van Alebeek, ‘Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts’, in *The Cambridge Handbook of Immunities and International Law*, T Ruys, N Angelet, and L Ferro (eds), (Cambridge University Press 2019) 496.

development of the law in this respect and may result in further acceptance of the exception to functional immunity for international crimes.

However, the ILC did deliberately exclude the crime of aggression in the list of crimes to which functional immunity does not apply. It explained, *inter alia*, that individual criminal responsibility for aggression cannot be established without considering the responsibility of the state, which would violate the principle *par in parem non habet imperium*.⁶² We understand that argument to relate first and foremost to the question of jurisdiction. While the question of jurisdiction over the crime of aggression is a real one – as also illustrated by the different positions on jurisdiction over aggression juxtaposed in the advisory report – we do not think that once jurisdiction is established, there is a relevant difference between aggression and other international crimes for the purpose of functional immunity.

4 A Human Rights Perspective on Immunity

From a human rights perspective, immunity rules are undesirable as they block the exercise of an individual's right of access to court. Moreover, the impunity that is not seldom the consequence of successful reliance on these rules may be problematic in terms of the obligation of states to effectively protect substantive fundamental rights and freedoms.

Despite this obvious tension between human rights and international immunity rules, the ECtHR has shied away from a critical assessment. In a consistent line of jurisprudence, the Court has recognised these immunity rules as inherent limitations to ECHR rights. In *Al-Adsani v the United Kingdom*, it found that the grant of state immunity 'pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty',⁶³ and concluded that 'measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction'.⁶⁴ Only if the grant of immunity at national level clearly exceeds the demands of international law will this be regarded as imposing a disproportionate restriction on the right of access to a court as enshrined in Article 6 ECHR.⁶⁵ While the ECtHR has never

62 A/77/10 (n 28) 239, Commentary to Draft Article 7, para 21.

63 *Al-Adsani v the United Kingdom* [GC] 35763/97 (ECtHR, 21 November 2001) para 54.

64 *Ibid* para 56.

65 *Jones v the United Kingdom* 34356/06 and 40528/06 (ECtHR, 14 January 2014) para 189 (*a contrario*).

ruled on the grant of personal or functional immunity in criminal proceedings,⁶⁶ there is no reason to think that it would reason differently in that context. The ECtHR clearly leaves the initiative to (further) limit immunity rules under international law to states.

A lot can, and has, been said about this rather conservative position of the ECtHR.⁶⁷ While the question exceeds the topic of this editorial, the ECtHR may possibly step up its demands by requiring states parties to the ECHR to interpret international immunity rules as restrictively as possible, so that they favour access to justice as a means to protect human rights. This means that, *if* international law is already evolving towards a more restrictive rule (i.e., a rule that considers immunity as not applicable) the ECHR may well oblige states to make use of that room for maneuver lest they violate Article 6 ECHR. We recall in this respect *Jones v the United Kingdom*,⁶⁸ in which the Court held as follows, in a case regarding functional immunity in civil matters:

[S]tate practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity *ratione materiae* [functional immunity] in such cases. [...] International opinion on the question may be said to be beginning to evolve, as demonstrated recently by the discussions around the work of the ILC in the criminal sphere. This work is ongoing and further developments can be expected.⁶⁹

At least in respect of functional immunity in the criminal sphere, such further developments have now materialised since the effective adoption by the ILC of an Article setting aside immunity as regards international crimes.⁷⁰

5 Concluding Remarks

The current situation presents states with an opportunity to change the current state of play of immunity rules through concerted action. The Parliamentary

66 However, see, *ibid*, regarding functional immunity in civil proceedings.

67 See, for example, A Orakhelashvili, 'State Immunity in National and International Law: Three Recent Decisions of the European Court of Human Rights' (2002) 15 *Leiden Journal of International Law* 703; E Voyakis, 'Access to Court v State Immunity' (2003) 52 *International and Comparative Law Quarterly* 297; R van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008) 390.

68 *Jones* (n 65).

69 See, *ibid* para 213.

70 A/77/10 (n 28) Chapter VI Article 7.

Assembly is urging states to do so by explicitly excluding personal immunities in the statute of the future aggression tribunal.⁷¹ The choices to be made are, however, not easy ones. Immunity rules serve important interests of the international community and exceptions always come at the risk of abuse. On the other hand, the interests of justice and accountability in the face of glaring and atrocious violations of fundamental rules of the international order are also evident. One interest that, in any case, needs to steer states' course of action in the coming time is the integrity of the international legal order. Any rule and interpretation devised for the present situation will have to be accepted as generally and universally applicable. For that reason, in an ideal world, abolishing the exceptional status of the crime of aggression in the ICC Rome Statute and working towards wide ratification is preferable over the establishment of yet another ad hoc tribunal. While this is clearly not realistic in the short term, we strongly believe that states pushing for an ad hoc tribunal to hold Russian leaders to account for the aggression committed against Ukraine should at the same time ratify the ICC Statute and the Kampala amendments on the crime of aggression if they have not done so already,⁷² and they should also put the jurisdictional regime of the ICC on the agenda once more. They should push for the changes necessary in order for the ICC to be able to establish jurisdiction over the crime of aggression on an equal footing with other international crimes and to exercise that jurisdiction as widely as possible.

Rosanne van Alebeek

Associate Professor of Public International Law, Amsterdam Center for International Law, University of Amsterdam, Amsterdam, the Netherlands
R.vanalebeek@uva.nl

Larissa van den Herik

Professor of Public International Law, Grotius Centre for International Legal Studies, Leiden University, Leiden, the Netherlands
L.van.den.Herik@LAW.leidenuniv.nl

Cedric Ryngaert

Professor of Public International Law, Utrecht Centre for Accountability and Liability Law, Utrecht University, Utrecht, the Netherlands
C.M.J.Ryngaert@uu.nl

⁷¹ Resolution 2482(2023) (n 8) para 7.3.

⁷² Notably, PACE also calls on member states and observer states of the Council of Europe to ratify the Rome Statute and the Kampala amendments. See, Resolution 2436(2022) (n 8) para 11.7; Resolution 2482(2023) (n 8) para 15.9.