
JURISDICTIONAL DISPLACEMENT AT THE FRONTIERS: AGGRESSION, COMMAND, AND THE RESTRUCTURING OF FUNCTIONAL IMMUNITY

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ABSTRACT

This article examines the competing rationales for denying functional immunity (immunity *ratione materiae*) to foreign state officials accused of international crimes, in light of the recent wave of domestic and international practice that has narrowed that immunity. It argues that the relationship between official immunity and international crimes is best explained by a single principle of jurisdictional displacement. According to this principle, immunity yields neither because international crimes are ‘private’ acts nor because the underlying prohibitions have a *jus cogens* character, but because international law has conferred a rule of criminal jurisdiction that necessarily contemplates the prosecution of state officials; the later jurisdictional rule must therefore be read as having displaced the earlier rule of immunity. The article then applies, and where necessary refines, this principle at three frontiers that recent practice has exposed. First, with regard to the crime of aggression, it demonstrates that, once displacement is uncoupled from the requirement of universal jurisdiction, the territorial jurisdiction of the victim state can displace functional immunity for this leadership crime. Secondly, it criticises the rank-based qualification that briefly entered German jurisprudence, showing that it is irreconcilable with the customary architecture of command responsibility. Thirdly, it addresses the problem of hybridity, arguing that internationalised tribunals may displace the personal immunity (immunity *ratione personae*) of serving leaders only where they exercise a properly international jurisdiction, and that the suspension of that immunity by the Special Tribunal for the Crime of Aggression against Ukraine is the doctrinally correct response to its territorial foundation. Drawing on the jurisprudence of the German Federal Court of Justice and the French Court of Cassation, the practice of the International Criminal Court, the draft articles adopted by the International Law Commission on

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second reading in 2026, and the Statute of the Special Tribunal, the article shows that these apparently distinct developments form part of a coherent structural shift in the relationship between state sovereignty and individual criminal accountability, with implications for the convention to be elaborated on the basis of the Commission's draft articles.

Keywords: functional immunity, crime of aggression, command responsibility, hybrid criminal tribunals, ILC draft articles on immunity of State officials.

1 INTRODUCTION

The international law of immunity is shaped by two commitments that stand in tension with each other, namely the sovereign equality of states and the individual accountability of those who govern them.¹ Traditionally, this tension has been resolved through a seemingly simple proposition, namely that the official acts of one state cannot be adjudicated in the courts of another.² In recent years, however, this proposition has been challenged from two directions. On the one hand, treaty regimes and customary norms have criminalised certain forms of official conduct;³ on the other hand, national courts have increasingly entertained prosecutions of foreign officials for genocide, crimes against humanity, war crimes, torture and enforced disappearance.⁴

To the best knowledge of this author, the most rigorous theoretical account of the relationship between immunity and accountability is that advanced by Akande and Shah, which is here referred to as 'jurisdictional displacement'.⁵ On this view, the traditional rationales for functional immunity-the substantive principle that an official's acts are attributable to the state alone, and the procedural principle that proceedings against the official are, in substance, proceedings against the state-are overcome neither by the *jus cogens* character of the

¹ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Merits) (Judgment) [2012] ICJ Rep 99 [57] ('*Jurisdictional Immunities*'), tracing state immunity to the principle of sovereign equality; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('*Rome Statute*'), preamble, paras 4–5, art 27.

² *The Schooner Exchange v McFaddon* 11 US (7 Cranch) 116 (1812) 137; *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270 ('*Jones (HL)*'). See generally Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013); Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008).

³ See e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('*Convention against Torture*'), arts 4–7; Rome Statute (n 1), arts 5–8.

⁴ Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30 EJIL 779.

⁵ Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 EJIL 815, 825–52.

prohibition at issue nor by the fiction that international crimes are necessarily private acts.⁶ Rather, immunity *ratione materiae* is displaced where international law has conferred a rule of extraterritorial criminal jurisdiction such that, in the words of Akande and Shah, ‘the application of the prior immunity would deprive the subsequent jurisdictional rule of practically all meaning’.⁷ Read in this light, the outcome in *Pinochet (No 3)* rests not on the impossibility of treating torture as an official act, but on the fact that the *aut dedere aut judicare* regime of the Convention against Torture would be deprived of practical content if immunity *ratione materiae* survived.⁸

Since that account was first advanced, the doctrinal landscape has changed considerably. The International Criminal Court (ICC) has issued arrest warrants against the leaders of two states not party to the Rome Statute, Russia and Israel,⁹ and has found Mongolia in breach of its obligations for failing to arrest President Putin during his visit to Ulaanbaatar in September 2024.¹⁰ The German Federal Court of Justice has rejected functional immunity in respect of the war crime of torture committed by an Afghan officer, at first confining its holding to subordinate officials and then, in 2024, abandoning that limitation.¹¹ In July 2025, the plenary assembly of the French Court of Cassation recognised, for the first time, an exception to functional immunity for crimes against humanity and war crimes,¹² while upholding the personal immunity of a serving head of state.¹³ On 25 June 2025, the Council of Europe and

⁶ Akande and Shah (n 5) 826–27, 828–38.

⁷ Akande and Shah (n 5) 841. Akande and Shah add that, even where the jurisdictional rule is not practically co-extensive with the immunity, it ‘will remove immunity where the jurisdictional rule contemplates and provides authority for national proceedings’ against officials; see Akande and Shah (n 5) 841.

⁸ *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL) (*‘Pinochet (No 3)’*) 266–67 (Lord Saville), 289–90 (Lord Phillips); Convention against Torture (n 3), arts 5–7. Articles 5–7 oblige each state party to establish jurisdiction over torture, including where the alleged offender is merely present in its territory, and either to extradite the offender or to submit the case to its prosecuting authorities.

⁹ ICC, ‘Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’ (ICC, 17 March 2023) <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>> accessed 12 March 2026; ICC, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects the State of Israel’s Challenges to Jurisdiction and Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant’ (ICC, 21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 3 April 2026. The former was the first warrant issued by the Court against the serving head of state of a permanent member of the Security Council.

¹⁰ *Situation in Ukraine* (Finding under Article 87(7) of the Rome Statute on the Non-Compliance by Mongolia with the Request by the Court to Cooperate in the Arrest and Surrender of Vladimir Vladimirovich Putin and Referral to the Assembly of States Parties) ICC-01/22-90 (24 October 2024) (*‘Mongolia Decision’*).

¹¹ Bundesgerichtshof (BGH) 3 StR 564/19 (28 January 2021) BGHSt 65, 286 (*‘BGH 2021’*); BGH AK 4/24 (21 February 2024) NJW 2024, 1674 (*‘BGH 2024 (Ahmad H)’*); BGH 3 StR 454/22 (20 March 2024) (*‘BGH 2024 (Anwar R)’*).

¹² Cour de cassation (Assemblée plénière) 24-84.071 (25 July 2025) (*Mayaleh*).

¹³ Cour de cassation (Assemblée plénière) 24-84.393 (25 July 2025) (arrest warrant against Bashar al-Assad) (*‘Al-*

Ukraine signed the agreement establishing the Special Tribunal for the Crime of Aggression against Ukraine.¹⁴ Finally, in May 2026, the International Law Commission (ILC) adopted on second reading its draft articles on immunity of State officials from foreign criminal jurisdiction, draft article 6 of which (draft article 7 on first reading) includes the crime of aggression among the crimes in respect of which immunity *ratione materiae* ‘shall not apply’.¹⁵

These developments raise questions that the displacement framework, as articulated so far, either left open or could not answer on its own terms. Three problems, or frontiers, may be identified. The first, and most evident, concerns aggression. The original exposition accepted that ‘there is no universal jurisdiction over the crime of aggression’ and, consequently, that the displacement analysis could not be invoked to lift immunity in that context.¹⁶ Yet an internationalised tribunal has now been established to try those who bear the greatest responsibility for the aggression against Ukraine, a category which, by definition, consists of the political and military leadership of the aggressor state.¹⁷ Since the Kampala Understanding on domestic jurisdiction declines to create any right or obligation for states to exercise domestic jurisdiction over an act of aggression committed by another state,¹⁸ one may wonder whether, and on what basis, a tribunal established through an international organisation may reach officials whom the courts of third states arguably may not. The second problem concerns rank. The German Federal Court of Justice initially confined its no-immunity holding to subordinate officials, in language criticised as a source of vagueness,¹⁹ even though the Federal Public Prosecutor General had argued for an unqualified rule.²⁰ The third problem concerns hybridity.

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¹⁴ Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal for the Crime of Aggression against Ukraine (signed 25 June 2025) (‘STCoA Agreement’), with the Statute of the Special Tribunal for the Crime of Aggression against Ukraine annexed (‘STCoA Statute’).

¹⁵ ILC, ‘Report of the International Law Commission on the Work of its Seventy-Seventh Session’ (2026) UN Doc A/81/10 (advance version) (‘ILC 2026 Report’), ch IV, paras 33–47, draft art 6. The renumbering results from the merger of first-reading draft articles 5, 6 into a single draft article 5; see ILC, ‘Statement of the Chair of the Drafting Committee, Mr Rolf Einar Fife: Immunity of State Officials from Foreign Criminal Jurisdiction’ (15 May 2026) (‘Drafting Committee Statement 2026’).

¹⁶ Akande and Shah (n 5) 836–37.

¹⁷ STCoA Statute (n 14), art 1, conferring jurisdiction over ‘persons who bear the greatest responsibility for the crime of aggression against Ukraine’.

¹⁸ ICC Review Conference Res RC/Res.6 (11 June 2010) (‘RC/Res.6’), Annex III, Understanding 5.

¹⁹ BGH 2021 (n 11) [13]ff. For criticism, see Florian Schmid, ‘An Unfortunate Trend of Vagueness: Why Germany Should Reconsider its Position on Functional Immunity Ratione Materiae’ (*Verfassungsblog*, 1 February 2024) <<https://verfassungsblog.de/an-unfortunate-trend-of-vagueness/>> accessed 14 January 2026.

²⁰ Leila Nadya Sadat, ‘New Developments in State Practice on Immunity of State Officials for International Crimes’ (2021) 25(18) ASIL Insights <<https://asil.org/insights/volume-25-issue-18/>> accessed 27 November 2025; Rohan Sinha, ‘Federal Court of Justice Rejects Functional Immunity of Low-Ranking Foreign State Officials in the Case of War Crimes’ (*German Practice in International Law*, 6 July 2021) <<https://gpil.jura.uni-bonn.de/2021/07/federal-court-of-justice-rejects-functional-immunity-of-low-ranking-foreign-state-officials-in-the-case-of-war-crimes/>> accessed 9 February 2026.

If the Special Tribunal is not an international tribunal in the sense of Nuremberg or the International Criminal Tribunal for the former Yugoslavia (ICTY), can it nevertheless reach the immunities of serving heads of state and, if so, by virtue of which feature of its constitution?

This article argues that the relationship between functional immunity and international crimes is best understood as one of jurisdictional displacement, and that this single principle, once freed from the assumption that the displacing rule must be one of universal jurisdiction, resolves all three problems. Functional immunity is displaced wherever international law has conferred a rule of criminal jurisdiction that contemplates the prosecution of state officials, irrespective of whether that rule is universal or territorial, customary or conventional, and of whether it is exercised by a national court or through the constituent instrument of an international or hybrid tribunal. Personal immunity, by contrast, is not displaced in the same manner, since no co-extensive rule reaches it, save before a tribunal exercising a properly international jurisdiction. Accordingly, this article reaches three conclusions. First, the territorial jurisdiction of the victim state, whether exercised by its own courts or entrusted to an internationalised tribunal, displaces the functional immunity of those accused of aggression, even though no third state could prosecute them on the basis of universal jurisdiction. Secondly, rank is irrelevant to the displacement of functional immunity. Thirdly, the suspension of personal immunity in the Statute of the Special Tribunal is the doctrinally correct response to its territorial foundation, rather than a failure of resolve.²¹ The contribution to knowledge of this article is therefore twofold. First, it refines a leading theoretical account of the relationship between immunity and international crimes in light of recent practice. Secondly, it may assist national courts, the Special Tribunal and states in the debates that will accompany the elaboration of a convention on the basis of the ILC's draft articles.

Some additional caveats are needed to accompany the reader through this analysis. First, this article does not seek to establish whether the exception to functional immunity codified by the ILC reflects *lex lata*; its aim is to explain the structure of the rule rather than to prove its customary status.²² Secondly, the article is concerned with criminal proceedings, and it addresses civil immunity only to the extent necessary to explain the different treatment of the two (section 4.3). Thirdly, the analysis focuses on proceedings before national courts and internationalised tribunals. It does not address the distinct questions of jurisdiction and

²¹ STCoA Statute (n 14), arts 1, 23(4)–(5), 25(2).

²² See ILC 2026 Report (n 15) general commentary, para (12); for the debate, see section 2.3.

admissibility raised by inter-state disputes before the International Court of Justice (ICJ) concerning the immunity of officials, although it relies on the case law of that Court as authority on the substantive rules.²³ Finally, this article accepts that the inductive identification of custom is a legitimate method. Its claim is not that the Commission erred in adopting that method, but that the rule so identified is best explained by the displacement framework. Undoubtedly, reasonable observers may disagree.

This article proceeds as follows. First, it sets out the displacement framework, distinguishes it from the non-official-act, normative-hierarchy and implied-waiver theories that it has supplanted, traces its reception in national courts and in the work of the ILC, and explains why it offers the best account of the no-immunity rule (section 2). Then, the article turns to the crime of aggression, explaining why a leadership crime over which there is no universal jurisdiction has resisted the displacement analysis, and showing how the Statute of the Special Tribunal derives its treatment of immunity from its territorial foundation (section 3). Section 4 addresses rank and hybridity, arguing that international humanitarian law (IHL) bridges functional immunity and individual responsibility, that command responsibility leaves no room for a rank-based qualification, and that the displacement of a serving leader's personal immunity depends on whether the tribunal concerned is properly international. Finally, section 5 concludes the discussion in the article, arguing that the developments of the past decade and a half have confirmed, rather than overtaken, the displacement framework.

2 THE DOCTRINAL ARCHITECTURE OF THE NO-IMMUNITY RULE

Before the frontiers of aggression, rank and hybridity can be examined, it is necessary to establish why functional immunity yields at all when an official is charged with an international crime. The question is not whether such crimes are grave, which is not in doubt, but how a rule that shields the official acts of state agents from foreign adjudication can be reconciled with rules that require or permit the prosecution of those very agents. Courts and commentators have answered that question in different ways, and the answer adopted determines both the scope of the no-immunity rule and its capacity to accommodate the developments examined in sections 3 and 4. This section first identifies the doctrinal question and the arguments that the displacement framework has supplanted (section 2.1). Then, it examines how national courts

²³ Such disputes have arisen between the Democratic Republic of the Congo and Belgium, between Djibouti and France, and between Equatorial Guinea and France; the judgments in those cases are cited where they are discussed below.

and the ILC have received the no-immunity rule (section 2.2). Finally, it explains why displacement offers the best account of that rule (section 2.3).

2.1 *The Doctrinal Question and the Displacement Framework*

The displacement framework is best understood against the rival arguments that it has supplanted. It is well established that a serving head of state, head of government or minister for foreign affairs (the so-called ‘troika’) enjoys immunity *ratione personae*, namely a complete immunity from foreign criminal jurisdiction that attaches to the office and lapses when the official leaves it.²⁴ The rule is now generally accepted, although the ICJ, in *Arrest Warrant*, derived it from the functions of the office rather than from any survey of state practice,²⁵ and Judge ad hoc Van den Wyngaert dissented on precisely that ground, finding that there was ‘no evidence in support of this proposition’.²⁶ Every state official, by contrast, enjoys immunity *ratione materiae* for acts performed in an official capacity, an immunity that attaches to the act and survives the end of tenure.²⁷ It is the latter immunity that the no-immunity rule concerns, and by 2010 three principal arguments had been advanced in its support.²⁸ The first argument, which received its highest-profile endorsement in Lord Browne-Wilkinson’s speech in *Pinochet (No 3)*, held that international crimes are not official acts at all, since it could not be an official function, for the purposes of international law, to do something that international law itself prohibits and criminalises.²⁹ The second argument, exemplified by the Italian Court of Cassation in *Ferrini* and by a substantial body of scholarship, posited a normative hierarchy, whereby the peremptory prohibitions of torture, genocide and crimes against humanity must

²⁴ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Merits) (Judgment) [2002] ICJ Rep 3 (‘*Arrest Warrant*’) [51], [53]–[55]; ILC 2026 Report (n 15), draft arts 3–4. The members of the troika are the only officials whose immunity *ratione personae* is generally accepted, although the position of certain other high-ranking officials, and of officials on special missions, remains debated; see Akande and Shah (n 5) 818–25.

²⁵ *Arrest Warrant* (n 24) [53]–[54]. The Court’s examination of state practice, at [58], was directed to the existence of exceptions to the immunity, not to the existence of the immunity itself.

²⁶ *Arrest Warrant* (n 24), Dissenting Opinion of Judge ad hoc Van den Wyngaert [2002] ICJ Rep 137 (‘*Van den Wyngaert Dissent*’) [11], disagreeing ‘with the proposition that incumbent Foreign Ministers enjoy immunities on the basis of customary international law’, and [23], concluding that the Court had ‘reached a conclusion which has no basis in positive international law’ and that it ‘should have satisfied itself of the existence of *usus* and *opinio juris*’.

²⁷ *Arrest Warrant* (n 24) [61]; ILC 2026 Report (n 15), draft art 5; Akande and Shah (n 5) 825–27.

²⁸ Akande and Shah (n 5) 828–38.

²⁹ *Pinochet (No 3)* (n 8) 203–05 (Lord Browne-Wilkinson). The earlier decision, *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 1)* [2000] 1 AC 61 (HL), was set aside for apparent bias in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL). The members of the seven-judge committee in *Pinochet (No 3)* divided in their reasoning, several of them resting the result on the jurisdictional scheme of the Convention against Torture rather than on any general theory of immunity.

prevail over the non-peremptory rule that confers immunity.³⁰ The third argument, which was less developed, held that a state acting in flagrant breach of a peremptory norm impliedly waives its immunity.³¹

Each of these arguments has been found wanting, on grounds that subsequent practice has largely vindicated.³² To begin with, the non-official-act argument sits uneasily with the very definition of torture in Article 1 of the Convention against Torture, which requires that the pain or suffering be inflicted ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.³³ To insist that such conduct must nonetheless be regarded as private for the purposes of immunity is to deny the very feature that makes it criminal under the Convention.³⁴ The House of Lords drew the same inference in *Jones*, where Lord Bingham rejected the contention that torture could not be an official act, since the Convention itself requires the involvement of a public official,³⁵ and Lord Hoffmann reasoned to the same effect.³⁶ The Commission has, for its part, provided that immunity does not apply to the crimes listed in its draft articles even where they were committed by an official acting in an official capacity,³⁷ and it expressly declined to rest the rule on the contested proposition that such crimes can never be functions of the state.³⁸ The implied-waiver argument, for its part, founders on the absence of any expression of the foreign state’s consent to jurisdiction and, more fundamentally, on the fact that immunity is determined at the threshold of proceedings, before the underlying allegation has been established.³⁹ Moreover,

³⁰ *Ferrini v Federal Republic of Germany* Corte di Cassazione (Sezioni Unite) 5044/2004 (11 March 2004); Alexander Orakhelashvili, ‘State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong’ (2007) 18 EJIL 955. Although *Ferrini* concerned the immunity of the state itself in civil proceedings, its reasoning was widely invoked in the debate on the immunity of officials. The ICJ subsequently held that Italy had violated Germany’s immunity; see *Jurisdictional Immunities* (n 1) [81]–[97], [139].

³¹ Adam C Belsky, Mark Merva and Naomi Roht-Arriaza, ‘Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law’ (1989) 77 Cal L Rev 365. The argument was rejected in *Princz v Federal Republic of Germany* 26 F 3d 1166 (DC Cir 1994) 1174, where the court held that an implied waiver ‘depends upon the foreign government’s having at some point indicated its amenability to suit’.

³² Akande and Shah (n 5) 828–38; *Jones* (HL) (n 2) (Lord Bingham, Lord Hoffmann).

³³ Convention against Torture (n 3), art 1(1).

³⁴ Akande and Shah (n 5) 831–32. The argument is described, though not endorsed, in *Arrest Warrant* (n 24), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal [85].

³⁵ *Jones* (HL) (n 2) [19] (Lord Bingham).

³⁶ *Jones* (HL) (n 2) [78]–[85] (Lord Hoffmann). See also *Jones v United Kingdom* (Merits) (Judgment) ECtHR App Nos 34356/06, 40528/06 (14 January 2014) [28], [35], recording the reasoning of both Law Lords.

³⁷ ILC, ‘Report of the International Law Commission on the Work of its Sixty-Ninth Session’ (2017) UN Doc A/72/10 (‘ILC 2017 Report’), commentary to draft art 7, para (4).

³⁸ ILC 2017 Report (n 37), commentary to draft art 7, paras (11)–(12); the commentary was carried forward on first reading in ILC, ‘Report of the International Law Commission on the Work of its Seventy-Third Session’ (2022) UN Doc A/77/10 (‘ILC 2022 Report’), commentary to draft art 7.

³⁹ *Princz* (n 31) 1174; Akande and Shah (n 5) 829–30.

the coexistence of state and individual responsibility for the same conduct-settled since the rejection of the act-of-state plea in the *Eichmann* proceedings-demonstrates that an act may be at once an act of the state and a crime of the individual.⁴⁰ It is therefore unnecessary to deny the official character of the act in order to found individual criminal responsibility.

The most serious objection, however, concerns the normative-hierarchy theory, which continues to command considerable support.⁴¹ Its premise is that a peremptory norm, being hierarchically superior, must prevail over any ordinary rule with which it conflicts.⁴² The difficulty is that there is no conflict.⁴³ The prohibition of torture and the rule conferring immunity address different questions. The former establishes that torture is unlawful and entails individual responsibility, whereas the latter determines whether a particular forum may exercise jurisdiction over a particular defendant at a particular time.⁴⁴ A rule concerning what may be done and a rule concerning who may adjudicate it operate at different levels, and the question of priority between them simply does not arise.⁴⁵ This is why the ICJ rightly insisted, in *Arrest Warrant*, that immunity from jurisdiction does not entail impunity.⁴⁶ The displacement framework, accordingly, locates the defeat of immunity not in the rank of the

⁴⁰ *Attorney-General of the Government of Israel v Eichmann* (1968) 36 ILR 5 (District Court of Jerusalem, 12 December 1961) [28]–[30], aff'd (1968) 36 ILR 277 (Supreme Court of Israel, 29 May 1962); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) (Judgment) [2007] ICJ Rep 43 [173]; UNGA Res 56/83, 'Responsibility of States for Internationally Wrongful Acts' (12 December 2001) UN Doc A/RES/56/83, Annex, art 58; Marina Spinedi, 'State Responsibility v. Individual Responsibility for International Crimes: *Tertium Non Datur*?' (2002) 13 EJIL 895.

⁴¹ See generally *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) [153]–[157]; *Ferrini* (n 30); *Al-Adsani v United Kingdom* (Merits) (Judgment) [GC] ECtHR App No 35763/97 (21 November 2001) ('*Al-Adsani*'), Joint Dissenting Opinion of Judges Rozakis and Caflisch; *Jurisdictional Immunities* (n 1), Dissenting Opinion of Judge Cançado Trindade [2012] ICJ Rep 179 [288]–[299]; Orakhelashvili, 'State Immunity and Hierarchy of Norms' (n 30); Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006); Alexander Orakhelashvili, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah' (2011) 22 EJIL 849, 851; Andrea Bianchi, 'Immunity versus Human Rights: The *Pinochet* Case' (1999) 10 EJIL 237. See also Lee M Caplan, 'State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory' (2003) 97 AJIL 741.

⁴² Orakhelashvili, 'State Immunity and Hierarchy of Norms' (n 30); *Ferrini* (n 30); *Al-Adsani* (n 41), Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić. The majority rejected the argument by nine votes to eight.

⁴³ Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili' (2011) 22 EJIL 857, 858.

⁴⁴ Akande and Shah (n 5) 826–27, 832–38; *Jurisdictional Immunities* (n 1) [92]–[97], where the Court held that the rules of state immunity 'are procedural in character' and do not conflict with substantive *jus cogens* rules; *Jones* (HL) (n 2).

⁴⁵ Stefan Talmon, '*Jus Cogens* after *Germany v. Italy*: Substantive and Procedural Rules Distinguished' (2012) 25 LJIL 979; Fox and Webb (n 2); Akande and Shah, 'Rejoinder' (n 43) 860, stressing that 'the granting of immunity is not a statement that an act is lawful'.

⁴⁶ *Arrest Warrant* (n 24) [60]. For analysis, see Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13 EJIL 853; Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case' (2002) 13 EJIL 877.

norm breached but in the structure of the jurisdictional regime erected around it.⁴⁷ This is not to say that the peremptory character of the core crimes is irrelevant, since it explains why states have been willing to confer jurisdiction over them.⁴⁸ However, peremptoriness cannot by itself defeat immunity; rather, it explains why states have conferred the jurisdiction that does so.⁴⁹

In place of these arguments, the displacement framework offers a positive account. On the one hand, the substantive function of functional immunity, which gives effect to the principle that an official's acts are attributable to the state, has been overtaken by the foundational principle of international criminal law that official position confers no exemption from criminal responsibility.⁵⁰ On the other hand, the procedural function of functional immunity, which guards against the circumvention of state immunity through proceedings against those who acted for the state, has been overtaken by a different development.⁵¹ The emergence of rules conferring extraterritorial criminal jurisdiction over international crimes, such as the grave breaches regime of the 1949 Geneva Conventions,⁵² torture under the 1984 Convention against Torture,⁵³ and enforced disappearance under the 2006 Enforced Disappearance Convention,⁵⁴

⁴⁷ Akande and Shah (n 5) 840–43.

⁴⁸ The prohibitions of aggression, genocide, crimes against humanity, torture, apartheid and racial discrimination, together with the basic rules of international humanitarian law, appear in the non-exhaustive list of peremptory norms annexed to the ILC's conclusions on *jus cogens*; see ILC, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries' in ILC 2022 Report (n 38), conclusion 23, Annex.

⁴⁹ *Jurisdictional Immunities* (n 1) [95]–[97]; *Jones* (HL) (n 2) (Lord Hoffmann).

⁵⁰ Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (signed and entered into force 8 August 1945) 82 UNTS 279, art 7; Charter of the International Military Tribunal for the Far East (19 January 1946, amended 26 April 1946), art 6; ILC, 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' [1950] II YB ILC 374 ('Nuremberg Principles'), Principle III; Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to UNSC Res 827 (25 May 1993) UN Doc S/RES/827 ('ICTY Statute'), art 7(2); Rome Statute (n 1), art 27(1). The International Military Tribunal stated the underlying premise in the following terms: 'Crimes against International Law are committed by men, not by abstract entities'; see 'Judgment of 1 October 1946' in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22 (HMSO 1950) 447 ('IMT Judgment').

⁵¹ Akande and Shah (n 5) 826–27; *Jones* (HL) (n 2) (Lord Bingham), explaining that proceedings against officials for official acts would otherwise allow the immunity of the state to be circumvented.

⁵² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ('Geneva Convention I'), art 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ('Geneva Convention II'), art 50; Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 ('Geneva Convention III'), art 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 ('Geneva Convention IV'), art 146.

⁵³ Convention against Torture (n 3), arts 5–7.

⁵⁴ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 ('Enforced Disappearance Convention'), arts 2, 9, 11.

presupposes national proceedings against the very officials who act for the state. Where such a jurisdictional rule is practically co-extensive with the immunity, the only coherent reading is that the later rule has displaced the earlier one.⁵⁵ In other words, the very rules that empower national courts to try international crimes would be frustrated if those courts were obliged to respect the immunity of the persons most likely to commit them.⁵⁶

2.2 Reception by National Courts and the Commission

Since the displacement framework was first articulated, practice has moved considerably in the direction that it anticipated. That practice comes principally from two sources, namely the decisions of national courts and the work of the ILC, which are examined in turn. It should be noted at the outset that most of the relevant prosecutions, in Germany, France, the Netherlands, Sweden and Switzerland, concern conduct connected with armed conflict or with the repression of civilian populations by state organs,⁵⁷ and the practice examined here is therefore drawn principally from IHL and international criminal law. One of the most influential judicial endorsements of the no-immunity rule is the judgment of the German Federal Court of Justice of 28 January 2021, concerning a former first lieutenant of the Afghan army who had been convicted by the Higher Regional Court of Munich of the mistreatment of captured fighters.⁵⁸ Having examined the question of immunity of its own motion, as a procedural prerequisite of its jurisdiction, the Court held that customary international law does not bar the prosecution before national courts of foreign subordinate state officials for war crimes and certain other offences affecting the international community as a whole.⁵⁹ It reached that conclusion inductively, through an extensive survey of state practice and *opinio juris* beginning with the legacy of Nuremberg and Article 7 of the Charter of the International Military Tribunal; and, in respect of the torture offences, it drew on the reasoning that the jurisdictional scheme of the

⁵⁵ Akande and Shah (n 5) 841.

⁵⁶ ‘Co-extensive’ is used here, following Akande and Shah, to denote a jurisdictional rule whose field of application overlaps so substantially with that of the immunity that, if the immunity were maintained, the rule would apply to few, if any, cases; see Akande and Shah (n 5) 841.

⁵⁷ See e.g., Oberlandesgericht (OLG) Koblenz (24 February 2021) (*Eyad A*), the first conviction anywhere of a former Syrian state official for (aiding and abetting) crimes against humanity; OLG Koblenz 1 StE 9/19 (13 January 2022) (*Anwar R*), aff’d BGH 2024 (*Anwar R*) (n 11); Rechtbank Den Haag (14 October 2005) (*Hesam*), aff’d Gerechtshof Den Haag (29 January 2007), Hoge Raad LJN BG1476 (8 July 2008); Stockholms tingsrätt (14 July 2022) (*Hamid Nouri*), aff’d Svea hovrätt (19 December 2023), leave to appeal refused Högsta domstolen (6 March 2024).

⁵⁸ BGH 2021 (n 11). See Aziz Epik, ‘No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from the German Federal Court of Justice’ (2021) 19 JICJ 1263.

⁵⁹ BGH 2021 (n 11) [13]ff; Claus Kreß, ‘On Functional Immunity of Foreign Officials and Crimes under International Law’ (*Just Security*, 31 March 2021) <<https://www.justsecurity.org/75596/on-functional-immunity-of-foreign-officials-and-crimes-under-international-law/>> accessed 18 December 2025; Sinha (n 20).

Convention against Torture is incompatible with a surviving immunity.⁶⁰ It is worth noting that the customary foundations of universal jurisdiction over war crimes, on which German jurisdiction rested, are themselves well established.⁶¹

The 2021 reasoning has since been reinforced. In February 2024, in proceedings concerning a member of a pro-government militia that had been integrated into the Syrian National Defence Forces and was accused of crimes against humanity and war crimes in the Damascus district of At-Tadamon, the same Court held that the exclusion of functional immunity for crimes under international law forms part of the undoubted body of customary international law and applies ‘irrespective of the status and rank of the perpetrator’.⁶² One month later, in dismissing the appeal of a former colonel of the Syrian General Intelligence Directorate sentenced to life imprisonment by the Higher Regional Court of Koblenz, the Court reiterated that the general functional immunity of state officials ‘finds its limit in crimes under international law’, and that the status and rank of the perpetrator are irrelevant.⁶³ Comparable proceedings have resulted in convictions elsewhere, namely of a former Rwandan intelligence officer in France,⁶⁴ of a former head of the Afghan military intelligence service in the Netherlands, where the Supreme Court held that the Wartime Offences Act afforded no entitlement to functional immunity,⁶⁵ and of a former Iranian prison official in Sweden.⁶⁶ Beyond these examples, the Swiss Federal Criminal Court rejected the functional immunity of a former Algerian minister of defence charged with war crimes,⁶⁷ and in May 2024 the same court convicted a former

⁶⁰ BGH 2021 (n 11), relying, among others, on Akande and Shah (n 5); Sadat (n 20); Sinha (n 20).

⁶¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I: *Rules* (CUP 2005) (‘ICRC Customary IHL Study’) rr 156–57; *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) (‘*Tadić* Jurisdiction Decision’) [96]–[137].

⁶² BGH 2024 (*Ahmad H*) (n 11) [53] (‘unabhängig vom Status und Rang des Täters’; author’s translation). See Aziz Epik and Julia Geneuss, ‘Without a Doubt: German Federal Court Rules No Functional Immunity for Crimes Under International Law’ (*Verfassungsblog*, 19 April 2024) <<https://verfassungsblog.de/without-a-doubt/>> accessed 5 March 2026; Svenja Raube, ‘Unmissverständliche Klarstellung zur funktionellen Immunität aus Karlsruhe: Anmerkung zu BGH, Beschluss vom 21.2.2024 – AK 4/24’ (*KriPoZ*, 31 May 2024) <<https://kripoz.de/2024/05/31/unmissverstaendliche-klarstellung-zur-funktionellen-immunitaet-aus-karlsruhe-anmerkung-zu-bgh-beschluss-vom-21-2-2024-ak-4-24/>> accessed 22 April 2026.

⁶³ BGH 2024 (*Anwar R*) (n 11) (‘Die allgemeine Funktionsträgerimmunität findet jedoch ihre Grenze in völkerrechtlichen Verbrechen’; author’s translation); see also Syria Justice and Accountability Centre, ‘To Each His Own: Immunities in International Law’ (*SJAC*, 2 May 2024) <<https://syriaaccountability.org/to-each-his-own-immunities-in-international-law/>> accessed 16 June 2026.

⁶⁴ Cour d’assises de Paris (14 March 2014) (*Pascal Simbikangwa*), aff’d Cour d’assises de Seine-Saint-Denis (3 December 2016).

⁶⁵ *Hesam* (n 57) Hoge Raad LJN BG1476 (8 July 2008) [7.2].

⁶⁶ *Hamid Nouri* (n 57). Mr Nouri was returned to Iran in June 2024 in the context of a prisoner exchange, which illustrates that the political vulnerability of such proceedings often lies at the stage of enforcement rather than of adjudication.

⁶⁷ *A v Ministère public de la Confédération* Tribunal pénal fédéral BB.2011.140 (25 July 2012) [5.4.3] (*Nezzar*). The proceedings came to an end following Mr Nezzar’s death in December 2023.

Gambian minister of the interior of crimes against humanity, an official described as the most senior ever convicted in Europe on the basis of universal jurisdiction.⁶⁸ Practice is not, moreover, confined to Europe. The Extraordinary African Chambers, established within the Senegalese courts by agreement between Senegal and the African Union, convicted the former President of Chad, Hissène Habré, of crimes against humanity, war crimes and torture, on the basis of a Statute that denied any exemption by reason of official capacity, including that of head of state.⁶⁹

French practice illustrates both the resistance that the framework has encountered and its eventual vindication. In January 2021, the Criminal Chamber of the Court of Cassation upheld the dismissal of a complaint lodged by two former Guantánamo detainees of French nationality against former senior United States officials, on the ground that the crimes alleged, whatever their gravity, fell within no exception to the principle of immunity.⁷⁰ The European Court of Human Rights subsequently declared inadmissible the applicants' complaint that the dismissal had denied them access to a court, observing that no rule of international law yet removed the immunity of state officials for serious violations of human rights.⁷¹ The 2021 decision was widely read as a regressive turn.⁷² It has, however, been overtaken. On 25 July 2025, the plenary assembly of the Court of Cassation held, in proceedings against a former governor of the Central Bank of Syria indicted for complicity in crimes against humanity and war crimes, that functional immunity cannot be invoked in prosecutions for such crimes.⁷³ It identified this exception in customary international law by reference to, among other authorities, the case law of the German Federal Court of Justice.⁷⁴ In a companion decision delivered on the same day,

⁶⁸ Tribunal pénal fédéral (15 May 2024) (*Ousman Sonko*); TRIAL International, 'Gambian Former Minister of Interior Ousman Sonko Convicted of Crimes against Humanity in Historic Swiss Trial' (*TRIAL International*, 15 May 2024) <<https://trialinternational.org/latest-post/gambian-former-minister-of-interior-ousman-sonko-convicted-of-crimes-against-humanity-in-historic-swiss-trial/>> accessed 8 July 2026.

⁶⁹ *Ministère public v Hissène Habré* Chambre africaine extraordinaire d'assises (30 May 2016), aff'd Chambre africaine extraordinaire d'assises d'appel (27 April 2017); Statute of the Extraordinary African Chambers within the Courts of Senegal, art 10(3); see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) (Judgment) [2012] ICJ Rep 422 ('*Belgium v Senegal*').

⁷⁰ Cour de cassation (chambre criminelle) 20-80.511 (13 January 2021); Sadat (n 20).

⁷¹ *Sassi and Benchellali v France* (Admissibility) (Decision) ECtHR App Nos 35884/21, 35886/21 (15 October 2024) [53], [61]–[62]; Tal Mimran, 'Immunity of State Officials from Criminal Jurisdiction: The Debate Continues' (*EJIL: Talk!*, 5 February 2025) <<https://www.ejiltalk.org/immunity-of-state-officials-from-criminal-jurisdiction-the-debate-continues/>> accessed 24 February 2026; Vladislav V Starzhenetsky and Anastasia S Vasiltssova, 'Why Cannot a French Court Award Compensation for Torture at Guantanamo: Commentary on the Decision of the European Court of Human Rights in the Case of Nizar Sassi v. France and Mourad Benchellali v. France' (2025) 3(3) HSE University Journal of International Law 147 (in Russian).

⁷² Sadat (n 20).

⁷³ *Mayaleh* (n 12).

⁷⁴ *Mayaleh* (n 12); 'France's Highest Court Rules on Functional Immunity and International Crimes' (*ASIL International Law in Brief*, 29 October 2025) <<https://asil.org/ilib/frances-highest-court-rules-functional->

the plenary assembly annulled the arrest warrant issued in November 2023 against Bashar al-Assad, then the serving head of state of Syria.⁷⁵ It held that customary international law recognised no exception to personal immunity for crimes against humanity or war crimes before national courts, and that France's non-recognition of the legitimacy of his government had no bearing on that immunity.⁷⁶ The two decisions map precisely onto the line that the displacement framework draws. Functional immunity yields to the jurisdictional regime governing international crimes, whereas personal immunity, which no co-extensive rule reaches before national courts, survives. In retrospect, therefore, the earlier divergence between Paris and Karlsruhe appears to have been less a disagreement about the content of custom than a stage in its consolidation. The plenary assembly also indicated that, once a head of state has left office, functional immunity cannot be opposed to prosecutions for international crimes.⁷⁷ That indication will soon be tested, since in January 2025, following the fall of his government, French investigating judges issued a new arrest warrant against Mr al-Assad, now a former head of state, for complicity in war crimes in connection with a 2017 bombing in Daraa.⁷⁸

The work of codification has followed a comparable trajectory, from uncertainty to consolidation. The ILC included the topic in its programme of work in 2007 and has considered it under three Special Rapporteurs.⁷⁹ Kolodkin's reports were sceptical of any general exception for international crimes,⁸⁰ whereas Escobar Hernández identified a clear trend towards recognising such exceptions;⁸¹ the Commission completed its first reading in 2022.⁸² Draft article 7, provisionally adopted in 2017 by a recorded vote of 21 to 8, with 1 abstention, listed six crimes in respect of which immunity *ratione materiae* 'shall not apply', namely genocide, crimes against humanity, war crimes, apartheid, torture and enforced

immunity-and-international-crimes/> accessed 11 August 2026. The plenary assembly (*Assemblée plénière*) is the most solemn formation of the Court of Cassation, in which all chambers are represented.

⁷⁵ *Al-Assad* (n 13).

⁷⁶ *Al-Assad* (n 13) [19], [38], [43].

⁷⁷ *Al-Assad* (n 13) [37], referring to genocide, crimes against humanity and war crimes.

⁷⁸ 'France Issues New Arrest Warrant for Syria's Assad: Source' (*Arab News*, 21 January 2025) <<https://www.arabnews.com/node/2587284/middle-east>> accessed 19 May 2026; see also *Al-Assad* (n 13) [54] (English translation), noting that the annulment 'has no bearing on the validity of an arrest warrant issued after the loss of the status of Head of State-In-Office'.

⁷⁹ Roman A Kolodkin (2007–2011), Concepción Escobar Hernández (2012–2022), Claudio Grossman Guiloff (since 2023).

⁸⁰ See in particular ILC, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur' (10 June 2010) UN Doc A/CN.4/631.

⁸¹ See in particular ILC, 'Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Concepción Escobar Hernández, Special Rapporteur' (14 June 2016) UN Doc A/CN.4/701.

⁸² ILC 2022 Report (n 38), ch VI.

disappearance.⁸³ In his second report, the third Special Rapporteur, Grossman Guiloff, proposed the addition of the crime of aggression, slavery and the slave trade.⁸⁴ The proposal divided the Commission. Some members welcomed it, while others pointed to the absence of supporting practice and to the practical difficulty of a national court determining whether a foreign state had committed aggression.⁸⁵ The Drafting Committee nonetheless provisionally adopted the revised provision in May 2025.⁸⁶ The Commission then adopted it in plenary on 28 April 2026 by a vote of 23 to 4, with 3 abstentions, and adopted the entire set of seventeen draft articles on second reading on 15 May 2026.⁸⁷ The provision, now draft article 6, extends the first-reading list to nine crimes and reads as follows:

*Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law, as defined according to the applicable rules of international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance; (g) crime of aggression; (h) slavery; (i) slave trade.*⁸⁸

The Commission has also recommended that the General Assembly elaborate a convention on the basis of the draft articles.⁸⁹ Two features of the provision deserve emphasis for present purposes. First, the crimes are listed without any qualification as to the rank of the official concerned.⁹⁰ Secondly, the provision says nothing about the basis on which the forum state

⁸³ ILC 2017 Report (n 37), ch VII. A recorded vote is unusual in the practice of the Commission, which ordinarily proceeds by consensus, and it signalled divisions that the second reading had to manage.

⁸⁴ ILC, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Claudio Grossman Guiloff, Special Rapporteur' (29 January 2025) UN Doc A/CN.4/780, paras 40–46, 79, recording, in respect of aggression, the views of Austria, Estonia, Ireland, Liechtenstein, Lithuania, Luxembourg, Poland, Romania, Sierra Leone, Switzerland and Ukraine; Hua Deng, 'Of Continuous Controversies and Unfinished Tasks: The ILC's Work on Immunity of State Officials from Foreign Criminal Jurisdiction' (*Völkerrechtsblog*, 21 July 2026) <<https://voelkerrechtsblog.org/of-continuous-controversies-and-unfinished-tasks/>> accessed 28 August 2026.

⁸⁵ ILC, 'Report of the International Law Commission on the Work of its Seventy-Sixth Session' (2025) UN Doc A/80/10 ('ILC 2025 Report'), ch V, paras 92, 121, 171.

⁸⁶ ILC, 'Statement of the Chair of the Drafting Committee, Mr Mario Oyarzábal: Immunity of State Officials from Foreign Criminal Jurisdiction' (23 May 2025) ('Drafting Committee Statement 2025').

⁸⁷ ILC 2026 Report (n 15), paras 13, 40–41. At the time of the vote, the provision still bore its first-reading number, draft article 7.

⁸⁸ ILC 2026 Report (n 15), paras 13, 40–41, 44, draft art 6. The draft articles are accompanied by a Part Four on procedural provisions and safeguards (draft arts 7–17), which applies whenever the forum state considers the application of draft article 6; see Drafting Committee Statement 2026 (n 15).

⁸⁹ ILC 2026 Report (n 15), para 44, recording the recommendation adopted on 20 July 2026 that a convention be elaborated, at the appropriate time, by the General Assembly or by an international conference of plenipotentiaries.

⁹⁰ ILC 2026 Report (n 15), draft art 6.

may exercise jurisdiction, which must be established independently, a point to which section 3.4 returns.⁹¹

The reaction of states has been mixed. Of the thirty-nine states that submitted written comments on the first-reading text, a clear majority supported limits on functional immunity for international crimes.⁹² A smaller group, comprising Brazil, France, Iran, Israel, Japan, the Russian Federation, Saudi Arabia, Singapore, the United Arab Emirates, the United Kingdom and the United States, was critical of draft article 7, invoking the asserted paucity of supporting practice or the risk of politically motivated proceedings.⁹³ Germany adopted an intermediate position, describing the exception as a rule of customary international law *in statu nascendi*.⁹⁴ At the other end of the spectrum, Austria stated that ‘no functional immunity exists for international crimes’, that the list ought to include aggression, and that the exception applies to members of the troika once they have left office.⁹⁵ It is worth noting that France’s critical stance before the Commission now sits uneasily with the subsequent ruling of its own highest court.⁹⁶ This illustrates the weight that judicial practice must carry in the identification of custom in this field.⁹⁷

On first reading, the Commission grounded draft article 7 in a combination of considerations, including a discernible trend in practice, the gravity of the crimes concerned, the principle of individual criminal responsibility, and the existence of treaty regimes contemplating the prosecution of officials.⁹⁸ It also explained the exclusion of aggression from the first-reading list by reference to the special character of that crime, whose prosecution would require a national court to pass upon a prior act of aggression by another state, with the political

⁹¹ Drafting Committee Statement 2025 (n 86) 7.

⁹² Joana de Andrade Pacheco, ‘Where Do States Stand on Official Immunity Under International Law?’ (*Just Security*, 19 April 2024) <<https://www.justsecurity.org/94830/where-do-states-stand-on-official-immunity-under-international-law/>> accessed 30 January 2026.

⁹³ ILC, ‘Immunity of State Officials from Foreign Criminal Jurisdiction: Comments and Observations Received from Governments’ (7 May 2024) UN Doc A/CN.4/771 (‘Comments and Observations’); Pacheco (n 92). The Russian Federation, for instance, ‘maintains that there are no such exceptions under customary international law’.

⁹⁴ Comments and Observations (n 93) (Germany, November 2023) 3. In BGH 2024 (*Anwar R*) (n 11), the Federal Court of Justice held that these comments did not cast doubt on the customary exclusion of functional immunity so as to require a referral to the Federal Constitutional Court under art 100(2) of the Basic Law.

⁹⁵ Comments and Observations (n 93) (Austria, December 2023).

⁹⁶ Comments and Observations (n 93) (France); *Mayaleh* (n 12).

⁹⁷ ILC, ‘Draft Conclusions on Identification of Customary International Law, with Commentaries’ in ‘Report of the International Law Commission on the Work of its Seventieth Session’ (2018) UN Doc A/73/10, conclusion 6(2), which lists decisions of national courts among the forms of state practice. Conclusion 7(2) adds that, where the practice of a particular state varies, the weight to be given to that practice may be reduced.

⁹⁸ ILC 2022 Report (n 38), commentary to draft art 7.

sensitivities that this entails.⁹⁹ It is precisely this reason that the inclusion of aggression on second reading must now overcome, and section 3.4 returns to it.

2.3 *Why Displacement Best Explains the No-Immunity Rule*

As mentioned in the introduction, this article does not seek to resolve whether draft article 6 reflects *lex lata* or *lex ferenda*, and the Commission itself has indicated that its draft articles contain elements of both codification and progressive development.¹⁰⁰ The claim advanced here is narrower, namely that displacement best explains the no-immunity rule and addresses all three problems identified in the introduction. It might be objected that, given the Commission's pluralist and inductive method, the theoretical debate has been overtaken, since the displacement framework would be merely one argument among several that the Commission set aside in favour of identifying custom from a body of practice. It is respectfully submitted that such an objection would be mistaken. The Commission's method, however well suited to its mandate, does not dispose of the theoretical question of why the rule is as it is.

The displacement thesis, according to which the growth of jurisdictional rules contemplating proceedings against state officials must be read as having impliedly displaced the prior rule of immunity, remains, it is argued here, the most persuasive account in the field, for three reasons. First, it avoids the conceptual difficulties that have beset its rivals, since it requires no artificial classification of international crimes as private acts, no conflict between substantive and procedural norms, and no implied waiver. Secondly, it explains what the case law actually does. When courts deny immunity in torture cases, they do so by reference to the particular features of the jurisdictional regime of the Convention against Torture rather than to the *jus cogens* character of the prohibition at large.¹⁰¹ Thirdly, it yields intelligible criteria for distinguishing the cases in which immunity has been displaced from those in which it has not.

⁹⁹ ILC 2022 Report (n 38), commentary to draft art 7; Grossman Guiloff (n 84), para 45, referring to the 'special political dimension' of the crime; Deng (n 84).

¹⁰⁰ ILC 2026 Report (n 15) general commentary, para (12). On the distinction, see Statute of the International Law Commission, annexed to UNGA Res 174 (II) (21 November 1947), art 15. For the debate, see Sean D Murphy, 'Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where Is the State Practice in Support of Exceptions?' (2018) 112 AJIL Unbound 4; Mathias Forteau, 'Immunities and International Crimes before the ILC: Looking for Innovative Solutions' (2018) 112 AJIL Unbound 22; Tal Mimran and Esther Halfon, 'ILC Draft Articles on Immunity of State Officials: Codification or Progressive Development?' (*Lieber Institute West Point: Articles of War*, 21 April 2026) <<https://lieber.westpoint.edu/ilc-draft-articles-immunity-state-officials-codification-progressive-development/>> accessed 7 May 2026.

¹⁰¹ *Pinochet (No 3)* (n 8) 266–67 (Lord Saville), 289–90 (Lord Phillips); BGH 2021 (n 11). For the competing readings of the speeches in *Pinochet (No 3)*, see Ingrid Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106 AJIL 731.

Displacement is plainest in regimes such as the Convention against Torture and the Enforced Disappearance Convention, where the offence is defined by reference to official capacity and the prosecution regime would therefore be all but meaningless if immunity survived.¹⁰² For other crimes, such as war crimes, crimes against humanity and genocide, the case is less direct but still defensible, since the relevant jurisdictional rules contemplate the prosecution of those acting on behalf of states.¹⁰³ The Genocide Convention, for instance, provides for trial by a court of the territorial state or by an international penal tribunal and denies any exemption to ‘constitutionally responsible rulers’, a structure that presupposes the prosecution of officials.¹⁰⁴

The displacement thesis is, moreover, firmly anchored in the general law governing the relationship between rules of international law. Akande and Shah framed the question as one of conflict between a later jurisdictional rule and a prior rule of immunity, which cannot be applied simultaneously.¹⁰⁵ The resolution of such a conflict in favour of the later and more specific rule reflects the maxims *lex posterior derogat legi priori* and *lex specialis derogat legi generali*, which the ILC has identified as generally accepted techniques for resolving normative conflicts in international law.¹⁰⁶ It may be objected that the rule of immunity is customary, whereas several of the displacing rules are conventional, and that a treaty cannot modify custom to the detriment of third states.¹⁰⁷ However, the displacement operates as between the parties to the relevant treaty, which are precisely the states whose officials the treaty regime contemplates prosecuting. Moreover, the ICJ has long accepted that customary and conventional rules may coexist and interact, the content of the one informing the application of the other.¹⁰⁸ In this sense, the displacement framework does not rely on any exceptional

¹⁰² Convention against Torture (n 3), art 1(1); Enforced Disappearance Convention (n 54), art 2, which defines enforced disappearance by reference to conduct ‘by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State’.

¹⁰³ Akande and Shah (n 5) 841–42; Institut de Droit International, ‘Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes’ (Naples, 2009) art III(1), providing that ‘[n]o immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes’.

¹⁰⁴ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, arts IV, VI.

¹⁰⁵ Akande and Shah (n 5) 841, referring to ‘a conflict between the later jurisdictional rule and the prior rule of immunity so that the two cannot be applied simultaneously’.

¹⁰⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (‘VCLT’), art 30(3); ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi (13 April 2006) UN Doc A/CN.4/L.682; ILC, ‘Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ [2006] II(2) YB ILC 177.

¹⁰⁷ VCLT (n 106), art 34.

¹⁰⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14 [175]–[179]; VCLT (n 106), arts 34, 41.

theory, but applies ordinary techniques of interpretation and conflict resolution to the specific field of immunities.

The framework has not, however, gone unchallenged. Orakhelashvili, the most consistent proponent of the normative-hierarchy theory, objected that it ‘attempts to introduce an extra element into the normative hierarchy’¹⁰⁹ and that, since a particular defendant’s immunity would leave jurisdiction intact in relation to others, ‘[i]mmunity would not deprive jurisdiction of all practical meaning’.¹¹⁰ He also invoked the statement of the ICJ in *Arrest Warrant* that the extension of criminal jurisdiction by treaty ‘in no way affects immunities under customary international law’.¹¹¹ Akande and Shah replied that their argument ‘is not about a hierarchy of norms but is an old-fashioned way of resolving conflicts of rules’,¹¹² adding that ‘[o]ne does not need a hierarchy of norms to achieve this effect’.¹¹³ It is submitted that the reply is persuasive, and that the remaining objections can be met. The statement in *Arrest Warrant* concerned the immunity *ratione personae* of an incumbent minister, which attaches to the office rather than to the act and which no co-extensive jurisdictional rule reaches before national courts.¹¹⁴ As to co-extensiveness, the relevant question is not whether some defendants would remain amenable to jurisdiction, but whether the jurisdictional rule would retain any meaningful field of application if the very persons whom it contemplates prosecuting, namely those who act in an official capacity, were immune. Where, as under the Convention against Torture, the offence can be committed only by or with the involvement of a public official, the answer is plainly negative.¹¹⁵

The framework also answers an objection that dominated the second reading. Several members of the Commission and several states argued that the practice supporting the exception is too thin to sustain a customary rule, observing that immunity was never argued in many of the prosecutions relied upon and that the absence of a plea therefore cannot show that immunity did not apply.¹¹⁶ The point is well taken as a matter of customary method, and the ICJ has itself indicated that a state which seeks to claim immunity for one of its organs is expected to notify

¹⁰⁹ Orakhelashvili, ‘Reply’ (n 41) 852.

¹¹⁰ Orakhelashvili, ‘Reply’ (n 41) 853.

¹¹¹ *Arrest Warrant* (n 24) [59]; Orakhelashvili, ‘Reply’ (n 41) 853.

¹¹² Akande and Shah, ‘Rejoinder’ (n 43) 860.

¹¹³ Akande and Shah, ‘Rejoinder’ (n 43) 861.

¹¹⁴ *Arrest Warrant* (n 24) [54], [59]–[61].

¹¹⁵ Convention against Torture (n 3), art 1(1); Akande and Shah (n 5) 841–42.

¹¹⁶ Murphy (n 100); Forteau (n 100); Mimran and Halfon (n 100), concluding that ‘the absence of any formal argument or judicial discussion precludes the inference that States have accepted’ the exception; ILC 2025 Report (n 85), paras 111, 116–17, 121.

the authorities of the forum state.¹¹⁷ The ICJ has not, moreover, ruled on the substance of the question. In *Immunities and Criminal Proceedings*, it held that it lacked jurisdiction over Equatorial Guinea's claim concerning the immunity of its Vice-President, while noting that this finding did not affect the continued application of the customary rules on immunity.¹¹⁸ Nevertheless, the objection tells against the inductive method, not against the displacement framework. On the displacement analysis, the defeat of functional immunity does not depend on a tally of cases in which immunity was pleaded and rejected; it follows, as a matter of law, from the conferral of a co-extensive jurisdictional rule, whether or not any defendant raised the point. Indeed, the silence of the case law is exactly what displacement predicts, since where immunity has already fallen by operation of law, there is nothing to plead. The same analysis clarifies the role of *jus cogens*. The Commission has relied on the peremptory character of the crimes as a criterion for their inclusion in the list,¹¹⁹ which is appropriate for the purpose of deciding which crimes belong on it. Peremptoriness, however, is not the ground on which immunity falls. It explains why states have conferred jurisdiction over these crimes; the conferral, in turn, displaces the immunity. The two operate in sequence, not in competition.

The displacement framework also clarifies the function of the procedural safeguards that the Commission has attached to draft article 6. Part Four of the draft articles requires the forum state to examine the question of immunity, to notify the state of the official, to consider any invocation of immunity by that state, and to determine the question before taking coercive measures.¹²⁰ One may wonder what the forum state is examining if immunity has already been displaced as a matter of law. The answer is that the safeguards do not concern the existence of the immunity, but whether the conduct alleged falls within the scope of the displacing rule. Put differently, the safeguards govern the characterisation of the facts rather than the entitlement to immunity, and their purpose is to ensure that the displacing rule is not invoked on a pretext. The forum state must determine whether the official is accused of a crime listed in draft article 6, whether its own jurisdiction rests on a rule that contemplates the prosecution of officials, and whether the evidence warrants proceedings.¹²¹ Accordingly, the notification requirement

¹¹⁷ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Merits) (Judgment) [2008] ICJ Rep 177 [196] ('*Djibouti v France*').

¹¹⁸ *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) (Judgment) [2018] ICJ Rep 292 [102], [154].

¹¹⁹ Diego Uribe Bustamante, 'Immunity of State Officials: A *Jus Cogens* Criteria for Draft Article 7?' (*EJIL: Talk!*, 19 March 2025) <<https://www.ejiltalk.org/immunity-of-state-officials-a-jus-cogens-criteria-for-draft-article-7/>> accessed 13 March 2026; Drafting Committee Statement 2025 (n 86).

¹²⁰ ILC 2026 Report (n 15), draft arts 8–10, 13; Drafting Committee Statement 2026 (n 15).

¹²¹ ILC 2026 Report (n 15), draft arts 8, 13; Drafting Committee Statement 2026 (n 15), noting that the concept of

identified in *Djibouti v France* and the safeguards in Part Four serve to verify the conditions of displacement rather than to restore an immunity that has fallen.¹²² Read in this way, the safeguards and the displacement framework are complementary rather than in tension.

Against this background, the 2021 judgment of the German Federal Court of Justice, although framed in the idiom of inductive custom, can be read as displacement reasoning in all but name.¹²³ Universal jurisdiction over war crimes could scarcely function if immunity continued to apply, since the structure of IHL presupposes that war crimes will ordinarily be committed by state-affiliated combatants acting under state authority.¹²⁴ The Drafting Committee reasoned in similar terms in 2025, observing that where international law confers extraterritorial jurisdiction and expressly permits the prosecution of individuals for official acts, ‘it would be logically inconsistent to permit the invocation of functional immunity to block such proceedings’.¹²⁵ At the same time, it added, in a passage to which section 3.4 returns, that ‘the non-application of immunity does not itself imply or create universal jurisdiction’.¹²⁶ In sum, codification has not rendered the displacement framework obsolete; rather, the framework explains the rule that the Commission has codified. As sections 3 and 4 show, however, the framework requires refinement in respect of each of the three problems identified in the introduction.

3 THE AGGRESSION PROBLEM

Aggression is a leadership crime, which can be committed only by those in a position to direct the political or military action of a state, and any prosecution of it therefore engages the immunities of senior officials at the outset.¹²⁷ The displacement framework, as originally formulated, offered no answer to that difficulty, since it made the defeat of functional immunity depend on a jurisdictional rule practically co-extensive with the immunity,¹²⁸ and its authors accepted that no such rule existed for aggression.¹²⁹ The difficulty is compounded by the architecture of the ICC’s own jurisdiction, which cannot reach the nationals of a non-party

the exercise of criminal jurisdiction is to be clarified in the commentary.

¹²² *Djibouti v France* (n 117) [196]; Drafting Committee Statement 2025 (n 86) 7.

¹²³ BGH 2021 (n 11); Kreß (n 59).

¹²⁴ Epik (n 58).

¹²⁵ Drafting Committee Statement 2025 (n 86) 5.

¹²⁶ Drafting Committee Statement 2025 (n 86) 5, 7.

¹²⁷ Rome Statute (n 1), art 8 *bis*(1).

¹²⁸ Akande and Shah (n 5) 841.

¹²⁹ Akande and Shah (n 5) 836.

aggressor state in the absence of a referral by the Security Council.¹³⁰ The establishment of the Special Tribunal, whose jurisdiction rests on the territoriality of the victim state, now calls for an answer to a question that the framework left open, namely whether a jurisdictional rule other than universal jurisdiction can displace the functional immunity of those accused of aggression.¹³¹

This section first explains why aggression, as a leadership crime, resists the displacement analysis (section 3.1) and why the Kampala compromise left a jurisdictional gap (section 3.2). Then, it examines the response embodied in the Special Tribunal (section 3.3). Finally, it proposes a refinement of the displacement framework capable of accommodating that response (section 3.4).

3.1 *Aggression as the Supreme International Crime*

No serving head of state has ever been tried for the crime of aggression.¹³² The Charter of the International Military Tribunal had placed crimes against peace first among the crimes within the Tribunal's jurisdiction, defining them as the 'planning, preparation, initiation or waging of a war of aggression'.¹³³ In a famous passage, the International Military Tribunal at Nuremberg stated as follows:

War is essentially an evil thing. Its consequences are not confined to the belligerent States alone but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.¹³⁴

Since then, however, aggression has been the subject of fewer prosecutions than any other core crime.¹³⁵ The reason for this is structural. As noted above, aggression is, in its definitional core,

¹³⁰ Rome Statute (n 1), arts 15 *bis*(5), 15 *ter*.

¹³¹ STCoA Statute (n 14), arts 1, 23(4).

¹³² The defendants convicted of crimes against peace at Nuremberg and Tokyo, among them Karl Dönitz, who had briefly succeeded Hitler as head of state in May 1945, were tried only after the unconditional surrender of the states they had served; see IMT Judgment (n 50) 507, 510.

¹³³ Charter of the International Military Tribunal (n 50), art 6(a), which also extended to 'a war in violation of international treaties, agreements or assurances' and to participation in a common plan or conspiracy to accomplish any of the foregoing.

¹³⁴ IMT Judgment (n 50) 421.

¹³⁵ See generally Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2017); Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2nd

a leadership crime. Its conduct element consists of the planning, preparation, initiation or execution of an act of aggression, defined by reference to the General Assembly's Definition of Aggression of 1974,¹³⁶ and, under Article 8 *bis*(1) of the Rome Statute, it can be committed only by 'a person in a position effectively to exercise control over or to direct the political or military action of a State'.¹³⁷ Accordingly, any prosecution of aggression necessarily raises the question of the immunities of senior officials, a question that the prosecution of a subordinate soldier may avoid. This scarcity of prosecutions is all the more remarkable since the substantive law has not been in doubt since Nuremberg.¹³⁸ At Nuremberg and Tokyo, the major war criminals were convicted of crimes against peace.¹³⁹ What has been missing, therefore, is not the law but a forum competent to apply it to the leaders of a state that has not consented to be judged.

The leadership character of the crime has a further consequence in the context of immunity. The original exposition of the displacement framework noted that no rule of universal jurisdiction over aggression exists and that, in its absence, the displacement analysis cannot operate.¹⁴⁰ The point drew on the Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, which reserved jurisdiction over aggression to an international criminal court, subject only to the jurisdiction of the aggressor state over its own nationals.¹⁴¹ The Commission reasoned that the determination by the courts of one state that another state had committed aggression would be contrary to the principle *par in parem non habet imperium*.¹⁴² Subsequently, the Kampala Review Conference adopted, in 2010, an Understanding according to which the aggression amendments 'shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State'.¹⁴³ Crucially, the Understanding neither prohibits

edn, CUP 2021).

¹³⁶ UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX), Annex ('Definition of Aggression'), arts 1, 3; Rome Statute (n 1), art 8 *bis*(2), which incorporates the list of acts in art 3 of the Definition.

¹³⁷ Rome Statute (n 1), art 8 *bis*(1), as inserted by RC/Res.6 (n 18). The leadership clause distinguishes aggression from the other crimes within the Court's jurisdiction, which may be committed by persons of any rank.

¹³⁸ Nuremberg Principles (n 50), Principle VI(a), listing crimes against peace among the crimes punishable under international law.

¹³⁹ IMT Judgment (n 50) 485–528; *United States v Araki*, Judgment of the International Military Tribunal for the Far East (Tokyo, 12 November 1948).

¹⁴⁰ Akande and Shah (n 5) 836–37.

¹⁴¹ ILC, 'Draft Code of Crimes against the Peace and Security of Mankind, with Commentaries' [1996] II(2) YB ILC 17 ('Draft Code'), art 8.

¹⁴² Draft Code (n 141), art 8, commentary, para (14).

¹⁴³ RC/Res.6 (n 18), Annex III, Understanding 5. Adopted by consensus together with the amendments, the Understandings may be regarded as part of the context for the interpretation of the amendments within the

domestic prosecutions nor addresses the position of the victim state, whose criminal law may well criminalise aggression, as Ukraine's does.¹⁴⁴

3.2 *The Kampala Compromise and the Jurisdictional Gap*

The jurisdictional gap is a product of the Kampala compromise itself. Article 15 *bis*(5) of the Rome Statute provides that, in respect of a state that is not a party to the Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that state's nationals or on its territory.¹⁴⁵ Moreover, that jurisdiction was activated only prospectively, with effect from 17 July 2018.¹⁴⁶ For Russia, which notified the depositary in 2016 of its intention not to become a party to the Statute,¹⁴⁷ the consequence is plain. The Court has no jurisdiction over the crime of aggression committed against Ukraine, though it has jurisdiction over the war crimes and crimes against humanity that have flowed from it.¹⁴⁸ Consequently, the supreme international crime is the one international crime that no permanent international court is presently competent to prosecute against the leaders most plausibly responsible for it.

This jurisdictional gap drove the campaign for a special tribunal. Within days of the Russian invasion, a group of jurists and former officials called for a tribunal whose specific purpose would be to fill the gap left by Articles 5 and 15 *bis*(5) of the Rome Statute.¹⁴⁹ Two main proposals emerged. One school favoured a tribunal established by agreement between the United Nations and Ukraine on the recommendation of the General Assembly; another favoured a tribunal established by treaty between Ukraine and a regional organisation, either the European Union or the Council of Europe, with internationalised judges and prosecutors

meaning of art 31(2)(a) VCLT (n 106). By its terms, however, Understanding 5 neither prohibits nor authorises domestic prosecutions, leaving the question to general international law.

¹⁴⁴ Criminal Code of Ukraine, art 437 (planning, preparation, initiation and waging of an aggressive war).

¹⁴⁵ Rome Statute (n 1), art 15 *bis*(5). By contrast, where the situation is referred by the Security Council, the Court may exercise jurisdiction irrespective of the consent of the states concerned: art 15 *ter*.

¹⁴⁶ Assembly of States Parties Res ICC-ASP/16/Res.5 (14 December 2017), para 1.

¹⁴⁷ Russian Federation: Communication (30 November 2016) UN Doc C.N.886.2016.TREATIES-XVIII.10. Such a notification, made in accordance with art 18(a) VCLT (n 106), releases the signatory from the obligation not to defeat the object and purpose of the treaty.

¹⁴⁸ Ukraine accepted the Court's jurisdiction by declarations under art 12(3) of 17 April 2014, 8 September 2015, and deposited its instrument of accession on 25 October 2024, the Statute entering into force for Ukraine on 1 January 2025. Accession does not close the aggression gap, since art 15 *bis*(5) turns on the status of the aggressor state.

¹⁴⁹ 'Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine' (4 March 2022), launched at Chatham House; Tom Dannenbaum, 'Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine' (*Just Security*, 10 March 2022) <<https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>> accessed 21 November 2025. For a sceptical assessment, see Kevin Jon Heller, 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis' (2024) 26 J Genocide Res 1.

but a jurisdiction formally derived from Ukraine.¹⁵⁰ The first school argued that only a tribunal endorsed by the General Assembly would possess the international character needed to displace the personal immunities of the troika; the second contended that the political cost of securing such a resolution was prohibitive and that a treaty-based tribunal could achieve much of the same result.¹⁵¹ Behind this disagreement lay a concern about legitimacy and selectivity, namely the fear that a tribunal created by a coalition of mostly European states to try the leaders of a single state would invite the charge of ‘victor’s justice’ that has often been levelled against international criminal law since Nuremberg.¹⁵² A General Assembly resolution, carrying the endorsement of the wider membership, was thought to answer that charge.¹⁵³ Its political infeasibility, however, once the likely pattern of votes became clear, left the regional route as the one realistically open, and no draft resolution was ever formally circulated.¹⁵⁴ The matter was taken forward by a Core Group of supporting states, whose work concluded at a ministerial meeting in Lviv on 9 May 2025, at which the participating states gave their political endorsement to the draft instruments.¹⁵⁵

3.3 *The Special Tribunal for the Crime of Aggression against Ukraine*

The compromise that emerged is closer to the second proposal. On 25 June 2025, President Zelensky and Secretary General Berset signed in Strasbourg the agreement establishing the Special Tribunal, with its Statute annexed.¹⁵⁶ The Tribunal has significant international

¹⁵⁰ Carrie McDougall, ‘Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics’ (*Opinio Juris*, 15 March 2022) <<https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/>> accessed 4 December 2025; Open Society Justice Initiative, ‘Immunities and a Special Tribunal for the Crime of Aggression against Ukraine’ (Briefing Paper, January 2023).

¹⁵¹ Kevin Jon Heller, ‘The *Jordan* Appeal Supports a Hybrid Tribunal Denying Personal Immunity’ (*Opinio Juris*, 6 February 2023) <<https://opiniojuris.org/2023/02/06/the-jordan-appeal-judgment-supports-a-hybrid-tribunal-denying-personal-immunity/>> accessed 17 February 2026; cf Dapo Akande and Talita de Souza Dias, ‘Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27(2) of the Rome Statute’ (*EJIL: Talk!*, 12 November 2018) <<https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/>> accessed 10 November 2025.

¹⁵² Heller, ‘Options for Prosecuting Russian Aggression’ (n 149); McDougall (n 150).

¹⁵³ McDougall (n 150).

¹⁵⁴ Christian Wenaweser and Sina Alavi, ‘A Special Tribunal for the Crime of Aggression Against Ukraine: Origins, Debates, and Implications’ (*Yale Journal of International Law Online*, 7 February 2026) <<https://yjil.yale.edu/posts/2026-02-07-a-special-tribunal-for-the-crime-of-aggression-against-ukraine-origins-debates-and>> accessed 25 March 2026.

¹⁵⁵ ‘Lviv Statement of the Core Group on the Establishment of a Special Tribunal for the Crime of Aggression against Ukraine’ (Lviv, 9 May 2025) <<https://www.kmu.gov.ua/en/news/lvivska-zaiava-koalitsii-derzhav-zi-stvorennia-spetsialnoho-trybunalu-shchodo-zlochynu-ahresii-proty-ukrainy>> accessed 12 June 2025.

¹⁵⁶ Council of Europe, ‘Ukraine and the Council of Europe Sign Agreement on Establishing a Special Tribunal for the Crime of Aggression against Ukraine’ (*Council of Europe*, 25 June 2025)

elements, including internationalised judges and an internationalised prosecutor,¹⁵⁷ a Management Committee to be constituted through an Enlarged Partial Agreement of the Council of Europe,¹⁵⁸ and the backing of a broad coalition. By May 2026, thirty-six states and the European Union had expressed their intention to join that Agreement, and the initial phase of the Tribunal is to be hosted in The Hague.¹⁵⁹ It does not, however, claim to be an international tribunal in the strict sense of Nuremberg or the ICTY.¹⁶⁰ On the contrary, Article 1 of the Statute provides that the Tribunal's jurisdiction 'is based on the territorial jurisdiction of Ukraine'.¹⁶¹ The drafters chose that footing deliberately, both to avoid resting the Tribunal on contested theories such as the pooled delegation of jurisdiction or universal jurisdiction, and to avoid its recharacterisation as an international court capable of displacing immunities.¹⁶²

The Statute's treatment of immunity is the most instructive feature of the new arrangement. Article 4(2) restates the principle that the official position of an individual shall not relieve him or her of criminal responsibility nor mitigate punishment, a formulation traceable to Article 7 of the Nuremberg Charter and reflected in Article 27(1) of the Rome Statute.¹⁶³ As to immunity proper, the Statute draws the now orthodox line between its two forms. Functional immunity is no bar, since Article 23(4) provides that immunity *ratione materiae* shall not apply before the Tribunal in respect of the crime of aggression.¹⁶⁴ Personal immunity, by contrast, is preserved for the duration of office. Under Article 23(5), where an indictment concerns a sitting head of state, head of government or minister for foreign affairs, the Pre-Trial Judge shall not

<<https://www.coe.int/en/web/portal/-/ukraine-and-the-council-of-europe-sign-agreement-on-establishing-a-special-tribunal-for-the-crime-of-aggression-against-ukraine>> accessed 15 April 2026; STCoA Agreement (n 14); Gaiane Nuridzhanian, 'The Newly Established Special Tribunal for the Crime of Aggression against Ukraine: Jurisdiction, Immunities and Due Process' (17 July 2025) SSRN <https://doi.org/10.2139/ssrn.5359650>.

¹⁵⁷ STCoA Statute (n 14), arts 8, 10, under which the judges and the Prosecutor are elected by the Management Committee.

¹⁵⁸ STCoA Agreement (n 14), art 5(1).

¹⁵⁹ Council of Europe, 'Special Tribunal for Ukraine: Broad Support for Council of Europe Agreement' (*Council of Europe*, 15 May 2026) <<https://www.coe.int/en/web/portal/-/special-tribunal-for-ukraine-broad-support-for-council-of-europe-agreement>> accessed 2 June 2026. An enlarged partial agreement is a form of cooperation within the Council of Europe in which only some member states participate, and which non-member states and the European Union may join; see Committee of Ministers Statutory Resolution (93) 28 on Partial and Enlarged Agreements (14 May 1993).

¹⁶⁰ Kevin Jon Heller, 'The New STCoA: The Good, the Bad, the Curious, and the Terrible' (*Opinio Juris*, 11 July 2025) <<https://opiniojuris.org/2025/07/11/the-new-stcoa-the-good-the-bad-the-curious-and-the-terrible/>> accessed 6 January 2026, describing it as a 'hybrid or internationalised tribunal'; Wenaweser and Alavi (n 154), describing it as a 'novel hybrid'.

¹⁶¹ STCoA Statute (n 14), art 1.

¹⁶² STCoA Statute (n 14), art 1; Hannah Lobel and Nema Milaninia, 'Building a Special Tribunal for the Crime of Aggression against Ukraine' (*EJIL: Talk!*, 25 July 2025) <<https://www.ejiltalk.org/building-a-special-tribunal-for-the-crime-of-aggression-against-ukraine/>> accessed 20 January 2026.

¹⁶³ STCoA Statute (n 14), art 4(2); Lobel and Milaninia (n 162), noting that the provision addresses the unavailability of a defence rather than the jurisdiction of the Tribunal; Rome Statute (n 1), art 27(1).

¹⁶⁴ STCoA Statute (n 14), art 23(4); Nuridzhanian (n 156).

confirm it until the person no longer holds that office or an appropriate waiver has been presented,¹⁶⁵ and Article 25(2) requires the proceedings to be suspended in the meantime.¹⁶⁶

This arrangement is more restrictive than is sometimes supposed. For as long as a troika member remains in office, the Prosecutor may investigate, gather evidence and prepare an indictment, but must refrain from measures of constraint against that person; the Pre-Trial Judge may not confirm the indictment, and no trial can take place.¹⁶⁷ The provision for trials *in absentia*, which preserves the right of a convicted person to a retrial, has itself been criticised,¹⁶⁸ and its interaction with Article 23(5) remains debated.¹⁶⁹ More generally, the compromise has attracted objections from two opposite directions. On the one hand, it is said to perpetuate impunity for as long as the incumbent remains in power, since the officials most likely to bear responsibility for aggression are precisely those who may retain office indefinitely.¹⁷⁰ On the other hand, it is said that a regional, treaty-based tribunal cannot reach even former officials of a non-consenting third state in respect of acts of such political sensitivity, given the Commission's earlier reluctance to allow national courts to pass upon another state's aggression, a criticism addressed in section 3.4.¹⁷¹

The Tribunal's institutional character invites comparison with the hybrid models that preceded it, although the comparison yields no bright line. The Special Court for Sierra Leone, created by treaty between the United Nations and Sierra Leone at the request of the Security Council,¹⁷² was the most clearly international, its Appeals Chamber holding in *Taylor* that it was an international criminal court before which the personal immunity of a serving head of state could not be invoked.¹⁷³ The Extraordinary Chambers in the Courts of Cambodia, which formed part

¹⁶⁵ STCoA Statute (n 14), art 23(5).

¹⁶⁶ STCoA Statute (n 14), art 25(2); Noëlle Quénivet, 'Symposium on Prosecuting Heads of State for International Crimes: The Special Tribunal for the Crime of Aggression against Ukraine and Immunities' (*Opinio Juris*, 24 March 2026) <<https://opiniojuris.org/2026/03/24/the-special-tribunal-for-the-crime-of-aggression-against-ukraine-and-immunities/>> accessed 29 April 2026.

¹⁶⁷ STCoA Statute (n 14), arts 23(5), 24(4), 25(2); Quénivet (n 166).

¹⁶⁸ STCoA Statute (n 14), art 28; Heller, 'The New STCoA' (n 160), criticising the provision.

¹⁶⁹ Quénivet (n 166).

¹⁷⁰ Kate McInnes, 'The Strongman's Clause: Article 23(5), the Rules-Based International Order, and the Ukraine Tribunal's Troubling Precedent' (*Opinio Juris*, 1 September 2025) <<https://opiniojuris.org/2025/09/01/the-strongmans-clause-article-235-the-rules-based-international-order-and-the-ukraine-tribunals-troubling-precedent/>> accessed 23 June 2026.

¹⁷¹ Nuridzhanian (n 156); see also Draft Code (n 141), art 8, commentary, para (14).

¹⁷² Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137; UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315.

¹⁷³ *Prosecutor v Taylor* (Decision on Immunity from Jurisdiction) SCSL-2003-01-I-059 (31 May 2004) [37]–[53].

of the Cambodian court system, were the least international;¹⁷⁴ the Special Tribunal for Lebanon and the Kosovo Specialist Chambers occupy intermediate positions, their constitutive instruments varying widely in form and pedigree.¹⁷⁵ The Special Tribunal falls in the middle. It is closer to the Sierra Leone court in its internationalised composition, but lacks the United Nations pedigree that some regard as decisive.¹⁷⁶ The comparison thus exposes the absence of any agreed criterion of international character, on which, as section 4.4 argues, the displacement of personal immunity turns. Indeed, the law has never settled how much collective endorsement, and of what kind, is required to cross the threshold.¹⁷⁷ The question is not merely academic, since the answer determines whether the Tribunal could ever try a serving member of the troika of the aggressor state.

3.4 *Reconceiving Displacement for the Leadership Crime*

What, then, does the Tribunal reveal about the displacement framework? Three points emerge. The first is that, as noted above, Article 4(2) of the Statute is not a doctrinal innovation.¹⁷⁸ What is distinctive is that the Statute pairs this substantive principle, common to Nuremberg and to Article 27 of the Rome Statute, with a procedural distinction between serving and former officials.¹⁷⁹ The drafters were plainly alive to the two phases of the ICC's jurisprudence on head-of-state immunity, which culminated in the controversial holding of the *Jordan Appeal Judgment* that customary international law recognises no immunity *ratione personae* before an international criminal court.¹⁸⁰ That holding was reached only after the Court's earlier and much-criticised reliance on a customary exception to head-of-state immunity.¹⁸¹

¹⁷⁴ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (2001, as amended 27 October 2004).

¹⁷⁵ Statute of the Special Tribunal for Lebanon, annexed to UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757, by which the Security Council, acting under Chapter VII of the UN Charter, brought the agreement between the United Nations and Lebanon into force; Law No 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Kosovo, 3 August 2015).

¹⁷⁶ Lobel and Milaninia (n 162); Heller, 'The New STCoA' (n 160).

¹⁷⁷ Wenaweser and Alavi (n 154), asking at what point a regional tribunal acquires sufficient international character to override personal immunities.

¹⁷⁸ STCoA Statute (n 14), art 4(2); Nuremberg Principles (n 50), Principle III; Rome Statute (n 1), art 27(1).

¹⁷⁹ STCoA Statute (n 14), arts 4(2), 23(4)–(5); cf Rome Statute (n 1), arts 27, 98(1). Article 98(1) of the Rome Statute prevents the Court from proceeding with a request for surrender which would require the requested state to act inconsistently with its obligations concerning the immunity of a third state, unless that state first waives the immunity.

¹⁸⁰ *Prosecutor v Al-Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397-Corr (6 May 2019) ('*Jordan Appeal Judgment*') [113]–[117].

¹⁸¹ *Prosecutor v Al Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-139-Corr (12 December 2011) [36]–[43];

The second point is that the framework, as originally formulated, cannot accommodate aggression without modification. Its core claim is that immunity *ratione materiae* is displaced by a jurisdictional rule practically co-extensive with it.¹⁸² As noted in section 3.1, however, there is no co-extensive rule of universal jurisdiction over aggression, and the Kampala Understanding declines to create one.¹⁸³ As originally stated, therefore, the framework would have no purchase on foreign national prosecutions for aggression, as its authors acknowledged.¹⁸⁴ Yet the Tribunal exists precisely to try those responsible for aggression, and the framework must say something about whether it may reach them. The answer lies in a refinement already implicit in the framework but never applied to territorial jurisdiction or to aggression. Akande and Shah accepted that a jurisdictional rule may remove immunity even where it is not strictly co-extensive with it, provided that it contemplates and authorises proceedings against officials.¹⁸⁵ On this refinement, the relevant relationship obtains between any specific jurisdictional rule, whether founded on universality, on treaty, on the territoriality of the forum state or on the authority of an international institution, and the immunity that would frustrate it. The paradigm remains the universal *aut dedere aut judicare* regime of the Convention against Torture,¹⁸⁶ but the same logic operates in narrower settings. The grave breaches regime of the 1949 Geneva Conventions, for instance, is a treaty-based obligation to search for and prosecute or extradite alleged offenders regardless of their nationality; it binds states as a matter of conventional obligation rather than customary permission, and the displacement it effects is no less real for that reason.¹⁸⁷ The Drafting Committee drew the corresponding line in 2025, insisting that the non-application of immunity does not itself create jurisdiction, which must be established independently.¹⁸⁸

The third point is that, applied to aggression, this refinement yields a clear result for functional immunity. The territorial jurisdiction of the victim state over aggression committed against it contemplates the prosecution of the officials who commit the crime, who will invariably be

Prosecutor v Al Bashir (Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir) ICC-02/05-01/09-302 (6 July 2017). See Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 AJIL 407; Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 JICJ 315.

¹⁸² Akande and Shah (n 5) 841.

¹⁸³ RC/Res.6 (n 18), Annex III, Understanding 5.

¹⁸⁴ Akande and Shah (n 5) 836–37.

¹⁸⁵ Akande and Shah (n 5) 841.

¹⁸⁶ Convention against Torture (n 3), arts 5(2), 7(1); *Belgium v Senegal* (n 69) [94]–[95].

¹⁸⁷ Geneva Convention I (n 52), art 49; Geneva Convention II (n 52), art 50; Geneva Convention III (n 52), art 129; Geneva Convention IV (n 52), art 146; ICRC, *Commentary on the First Geneva Convention* (2nd edn, CUP 2016), commentary to art 49.

¹⁸⁸ Drafting Committee Statement 2025 (n 86) 7.

officials of the aggressor state; to recognise their functional immunity would deprive that jurisdiction of practically all meaning.¹⁸⁹ That jurisdiction therefore displaces their functional immunity, whether it is exercised by the victim state's own courts or, as Article 1 of the Statute provides, through an internationalised tribunal; Article 23(4) simply gives express effect to that displacement.¹⁹⁰ The *par in parem* concern that underlay the Commission's earlier caution has least force in this setting, since the victim state is not a third state passing judgment on a dispute to which it is a stranger, but the state against whose sovereignty the crime was directed.¹⁹¹ This conclusion finds support in practice. Ukrainian courts have applied the domestic crime of aggression to senior officials, as illustrated by the conviction *in absentia* of a former President of Ukraine for complicity in the waging of an aggressive war.¹⁹² More significantly, the position of the territorial state has long been recognised as a special case in the law of immunities. In *Khurts Bat*, the English High Court held that a Mongolian official accused of crimes committed on German territory enjoyed no immunity *ratione materiae*, relying on the view of Special Rapporteur Kolodkin that, where the territorial state has not consented to the official's presence and activity, there are sufficient grounds to speak of an absence of immunity.¹⁹³ The same logic underlies the territorial exception to state immunity in civil proceedings concerning death, personal injury or damage to property caused in the forum state.¹⁹⁴ Aggression is, by definition, conduct directed against the sovereignty and territorial integrity of the victim state,¹⁹⁵ and the case for the jurisdiction of that state is therefore, if anything, stronger than in these settings. Personal immunity, however, is another matter. A jurisdiction grounded, as Article 1 grounds this one, in the territoriality of a single state is the kind of nationally derived jurisdiction that, on the reasoning in *Arrest Warrant*, cannot override

¹⁸⁹ Rome Statute (n 1), art 8 *bis*(1); Criminal Code of Ukraine (n 144), art 437. On territoriality as the primary basis of criminal jurisdiction, see *Case of the SS 'Lotus' (France v Turkey)* (Judgment) PCIJ Rep Series A No 10 (7 September 1927) 20; Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015).

¹⁹⁰ STCoA Statute (n 14), arts 1, 23(4).

¹⁹¹ The Commission considered, but did not adopt, a separate exception for crimes committed in the territory of the forum state, a question which some members felt had not been sufficiently examined; see ILC 2025 Report (n 85), paras 109, 119. The argument advanced in the text does not depend on such an exception, since it rests on the displacement effected by the forum state's territorial jurisdiction over a crime whose perpetrators are necessarily foreign officials.

¹⁹² Obolonskyi District Court of Kyiv (24 January 2019) (*Yanukovych*), applying arts 111(1), 437(2) of the Criminal Code of Ukraine (n 144). Since the defendant was a Ukrainian national, no question of foreign immunity arose; the judgment nonetheless illustrates that the territorial state treats aggression as a crime that its own courts may adjudicate.

¹⁹³ *Khurts Bat v Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin) [96]–[101] (Moses LJ).

¹⁹⁴ United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) 44 ILM 803, art 12.

¹⁹⁵ Definition of Aggression (n 136), art 1, defining aggression as the use of armed force 'against the sovereignty, territorial integrity or political independence of another State'.

the immunity *ratione personae* of a serving member of the troika.¹⁹⁶ That is why the Statute suspends, rather than abolishes, personal immunity.¹⁹⁷ From the perspective of the displacement framework, the Statute's approach is therefore consistent rather than contradictory. Functional immunity falls because the territorial rule is co-extensive with it, whereas personal immunity survives, in suspended form, because no rule capable of displacing it has yet been brought to bear.

Whether the Tribunal might one day reach personal immunity is more contested, and here the framework must be handled with care, since it was originally concerned only with immunity *ratione materiae*.¹⁹⁸ The extension is defensible only where the jurisdictional rule is exercised by a genuinely international institution rather than by a national or nationally derived court. The reason, once again, is co-extensiveness. Universal jurisdiction exercised by foreign national courts would be excessively broad if it displaced the personal immunities of every serving troika member of every state, whereas a regime exercised by a tribunal established by states acting collectively through an international organisation can be read as a collective decision to disable a defined set of immunities in defined cases.¹⁹⁹ Heller has argued that the breadth and depth of international endorsement, rather than the formal mode of constitution, are what matter.²⁰⁰ The drafters took the more cautious path, grounding the Tribunal in Ukrainian territoriality and suspending personal immunity, precisely because they doubted that a regional body could claim the requisite international character.²⁰¹ Two theories of international character compete here. On a delegation theory, an internationalised tribunal may exercise only the jurisdiction that its founding states themselves possess. On that view, a body built on Ukrainian territoriality can no more disable a third state's personal immunities than Ukraine could acting alone.²⁰² On a representative theory, by contrast, a tribunal sufficiently endorsed by the international community acts not as the delegate of its founders but on behalf of that community, and may set aside immunities accordingly.²⁰³ The suspension effected by the Statute is intelligible on either view, which is part of its prudence. The ILC's draft articles

¹⁹⁶ *Arrest Warrant* (n 24) [54], [58]–[61].

¹⁹⁷ STCoA Statute (n 14), arts 23(5), 25(2).

¹⁹⁸ Akande and Shah (n 5) 818–25, treating immunity *ratione personae* as absolute before foreign national courts.

¹⁹⁹ *Arrest Warrant* (n 24) [58], [61]; Akande and Shah (n 5) 818–25; *Jordan Appeal Judgment* (n 180) [115].

²⁰⁰ Heller, 'The *Jordan Appeal*' (n 151); Heller, 'The New STCoA' (n 160).

²⁰¹ Lobel and Milaninia (n 162); STCoA Statute (n 14), art 1.

²⁰² Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 JICJ 618.

²⁰³ The representative reasoning finds expression in *Taylor* (n 173) [37]–[42], [51]–[52], and in *Jordan Appeal Judgment* (n 180) [115].

leave the question open, since they do not affect the obligations of states under agreements establishing international criminal courts and tribunals, as between the parties to those agreements.²⁰⁴ Which of these views will prevail is likely to be one of the most significant questions of international institutional law in the coming years.

4 RANK, COMMAND AND THE LIMITS OF DISPLACEMENT

Section 3 has shown that the displacement framework can accommodate aggression once it is freed from the requirement of universal jurisdiction. The two remaining problems test the framework from a different angle. The rank problem asks whether the seniority of an official affects the displacement of functional immunity, a question brought into focus by the qualification that briefly entered German jurisprudence in 2021.²⁰⁵ The hybridity problem asks whether a tribunal that is neither wholly national nor wholly international can set aside the personal immunity of a serving leader, a question that the Statute of the Special Tribunal has deferred rather than resolved.²⁰⁶ Both problems turn on the boundary between immunity *ratione materiae*, which the framework addresses directly, and immunity *ratione personae*, which it was not designed to reach. This section first examines how the rank question arose and was resolved (section 4.1) and why rank is irrelevant under the displacement framework (section 4.2). Then, it shows how IHL bridges functional immunity and individual responsibility (section 4.3). Finally, it addresses personal immunity before hybrid tribunals (section 4.4).

4.1 The Rank Question and Its Resolution

As seen in section 2.3, the 2021 judgment of the German Federal Court of Justice can be read as displacement reasoning in all but name. It could therefore have represented a decisive judicial endorsement of the displacement framework. It rejected functional immunity for the war crime of torture in unequivocal terms and drew on a broad range of practice and scholarship.²⁰⁷ However, it contained a qualification that generated uncertainty, since it held that functional immunity does not bar the prosecution of foreign *subordinate* officials for war crimes, in language that left open the possibility that high-ranking officials might retain a

²⁰⁴ ILC 2026 Report (n 15), draft art 1(3).

²⁰⁵ BGH 2021 (n 11) [13]ff; Schmid (n 19).

²⁰⁶ STCoA Statute (n 14), arts 23(5), 25(2).

²⁰⁷ BGH 2021 (n 11); Kreß (n 59); Epik (n 58).

residual functional immunity denied to their subordinates.²⁰⁸ The Federal Public Prosecutor General had argued that no such qualification was warranted,²⁰⁹ and the reservation was duly criticised as a source of vagueness.²¹⁰

The risks generated by this qualification soon became apparent. In civil proceedings brought by Mr Ziada, arising from an air strike during the 2014 Gaza conflict, the Hague Court of Appeal upheld the functional immunity of the former Chief of the General Staff of the Israel Defense Forces and the former commander of the Israeli Air Force.²¹¹ In doing so, it invoked the German judgment in order to distinguish high-ranking officers from the subordinate official whose prosecution the Federal Court of Justice had allowed; the Supreme Court of the Netherlands affirmed.²¹² Since those proceedings were civil, the outcome is consistent with the asymmetry discussed in section 4.3. Nevertheless, the reasoning illustrates how a rank-based reservation, once articulated, may be relied upon by courts in other jurisdictions and in other contexts. The Federal Court of Justice has since dispelled this uncertainty. In February 2024, it held, without qualification, that functional immunity does not bar the prosecution of crimes under international law ‘irrespective of the status and rank of the perpetrator’,²¹³ and it repeated that holding a month later.²¹⁴ The brief ambiguity of 2021 has thus been resolved by the court that created it, in favour of the unqualified rule for which the Federal Public Prosecutor General had contended. The Dutch proceedings may also be revisited, since Mr Ziada’s pending application before the European Court of Human Rights will offer that Court an opportunity to reconsider the relationship between functional immunity and access to a court in light of that asymmetry.²¹⁵ Whatever the outcome of that application, the criminal and civil questions must be kept distinct, since only the former is governed by a co-extensive jurisdictional rule, as section 4.3 explains, and the outcome of the Dutch civil proceedings therefore says nothing

²⁰⁸ BGH 2021 (n 11) [13]ff, referring to *nachrangige Hoheitsträger*; Sinha (n 20), noting that national courts ‘may prosecute at least low-ranking officials’; Krefß (n 59).

²⁰⁹ Sadat (n 20).

²¹⁰ Schmid (n 19).

²¹¹ *Ziada v Gantz* Gerechtshof Den Haag (7 December 2021), aff’d Hoge Raad (25 August 2023); Schmid (n 19). See also, on the first-instance decision of the Rechtbank Den Haag (29 January 2020), Cedric Ryngaert, ‘Functional Immunity of Foreign State Officials in Respect of International Crimes before the Hague District Court: A Regressive Interpretation of Progressive International Law’ (*EJIL: Talk!*, 2 March 2020) <<https://www.ejiltalk.org/functional-immunity-of-foreign-state-officials-in-respect-of-international-crimes-before-the-hague-district-court-a-regressive-interpretation-of-progressive-international-law/>> accessed 26 May 2026. The claimant has since lodged an application against the Netherlands before the European Court of Human Rights, invoking arts 6, 14 of the European Convention on Human Rights.

²¹² *Ziada* (n 211); Schmid (n 19).

²¹³ BGH 2024 (*Ahmad H*) (n 11) [53]; Epik and Geneuss (n 62).

²¹⁴ BGH 2024 (*Anwar R*) (n 11).

²¹⁵ *Ziada* (n 211).

about the criminal position.

4.2 *Why Rank Is Irrelevant under the Displacement Framework*

The rank qualification finds no support in the displacement framework. The framework turns on whether a later jurisdictional rule is practically co-extensive with an earlier immunity, and the relevant question is whether the rule contemplates the prosecution of state officials, not whether it contemplates officials of a particular rank. The grave breaches regime of the 1949 Geneva Conventions draws no distinction between privates and generals,²¹⁶ and the public-official element of the Convention against Torture draws none between a junior interrogator and a ministerial supervisor.²¹⁷ If functional immunity is displaced for the one, it is displaced for the other.

Indeed, the qualification makes the framework less coherent, since it implies that the principle of individual responsibility applies in full to subordinates while sparing those most likely to have ordered the crimes, which inverts the logic of international criminal law.²¹⁸ The proper means of addressing the legitimate concerns raised by the prosecution of senior officials is not a rank-based qualification of functional immunity, but the doctrine of immunity *ratione personae*, which protects the narrow class of serving senior officials for the duration of their office and lapses upon their departure. It thereby accommodates the concern for the conduct of international relations without conferring a lasting impunity. It may be objected that the ICJ's dictum in *Arrest Warrant* implies a residual immunity for official acts. It stated as follows:

*[A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.*²¹⁹

²¹⁶ Geneva Convention I (n 52), art 49; Geneva Convention IV (n 52), art 146.

²¹⁷ Convention against Torture (n 3), art 1(1).

²¹⁸ Nuremberg Principles (n 50), Principle III; IMT Judgment (n 50) 447; Rome Statute (n 1), art 27.

²¹⁹ *Arrest Warrant* (n 24) [61].

By implication, acts performed during office in an official capacity would remain covered.²²⁰ That dictum, however, has been widely criticised,²²¹ and it addressed the general position before national courts rather than the effect of specific jurisdictional rules such as those examined here.²²² It follows that the rank reservation was doctrinally redundant, since it operated precisely where personal immunity already applied. Practice confirms the point, since the conviction in Switzerland of a former Gambian minister of the interior, mentioned in section 2.2, concerned an official of ministerial rank.²²³

A regional instrument might be thought to point in the opposite direction. Article 46A *bis* of the Malabo Protocol provides that no charges shall be commenced or continued before the African Court against any serving head of state or government, ‘or other senior state officials based on their functions, during their tenure of office’.²²⁴ The provision has been widely criticised,²²⁵ and it is undoubtedly at odds with the trend examined in this article. Nevertheless, it confirms rather than contradicts the displacement framework in two respects. First, it reflects a treaty choice not to confer on the African Court a jurisdictional rule co-extensive with the immunities of serving officials, and the framework predicts that, absent such a rule, no displacement occurs. Secondly, the protection it affords is expressly limited to the tenure of office.²²⁶ It extends a form of temporary protection to a wider class of officials, but it preserves no residual functional immunity once they have left office. Even this instrument, therefore, does not support the proposition that senior officials retain functional immunity for international crimes after their tenure.

²²⁰ Cassese (n 46) 867–68.

²²¹ Cassese (n 46) 867–70, describing the distinction between official and private acts as one that, in this context, ‘proves ambiguous and indeed untenable’, and asking ‘why should one confine trials by foreign courts to acts performed “in a private capacity”?’; Wirth (n 46) 881, 890, observing that ‘a former official no longer has any functions which would require protection’ and concluding that ‘the Court was wrong in also holding that a former Minister of Foreign Affairs is immune’; Van den Wyngaert Dissent (n 26) [36], regretting that the Court had not added that ‘war crimes and crimes against humanity can never fall into this category’; see also *Arrest Warrant* (n 24), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal [78], declaring themselves ‘less than sanguine’ about the examples given in para 61, and [85].

²²² *Arrest Warrant* (n 24) [61]; Akande and Shah (n 5) 838–39. Notably, the same paragraph recognised that immunity does not bar prosecution before ‘certain international criminal courts, where they have jurisdiction’.

²²³ *Ousman Sonko* (n 68).

²²⁴ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014, not yet in force) (‘Malabo Protocol’), art 46A *bis*; Dan Kuwali, ‘Article 46A *Bis*: A Step Backward in Ending Impunity in Africa’ (*Kujenga Amani*, 22 September 2014) <<https://kujenga-amani.ssrc.org/2014/09/22/article-46a-bis-a-step-backward-in-ending-impunity-in-africa/>> accessed 14 July 2026.

²²⁵ Kuwali (n 224); Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (AFR 01/3063/2016, 2016); cf Dire Tladi, ‘The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff’ (2015) 13 JICJ 3.

²²⁶ Malabo Protocol (n 224), art 46A *bis*, referring to charges against officials ‘during their tenure of office’.

4.3 *International Humanitarian Law as the Doctrinal Bridge*

The relationship between functional immunity and individual responsibility is worked out most clearly in IHL, three features of which bear on the displacement analysis. The first is that, at least since the Geneva Conventions of 1949, the law has assumed that those who commit grave breaches will ordinarily be agents of a state. The obligation to search for and prosecute or extradite was framed on the assumption that the persons concerned would, for the most part, be members of the armed forces or other organs of a party to the conflict.²²⁷ The displacement of functional immunity is, accordingly, written into the structure of the regime, and any other reading would deprive it of effect.

The second feature is command responsibility. Recognised in Additional Protocol I, codified in Article 28 of the Rome Statute and reflected in customary law, the doctrine renders military commanders and civilian superiors responsible for crimes committed by subordinates of which they knew or had reason to know and which they failed to prevent or punish.²²⁸ The doctrine reaches back to the responsibility imposed on General Yamashita and has been elaborated in the jurisprudence of the ICTY and of the ICC.²²⁹ It is structurally incompatible with any rank-based qualification. If a subordinate soldier may be prosecuted for a war crime, his or her commander may be prosecuted for the same conduct as a superior, and the same reasoning applies at each level of the chain of command, up to the senior leadership.²³⁰ A commander who is criminally responsible for failing to prevent the crimes of his or her subordinates cannot at the same time claim that his or her exercise of command, being an official function, is shielded by rank. To accept a residual immunity for senior commanders before national courts would render the customary doctrine reflected in Article 28 largely ineffective in every forum

²²⁷ Jean S Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, vol IV (ICRC 1958), commentary to art 146; ICRC, *Commentary on the First Geneva Convention* (n 187), commentary to art 49.

²²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ('Additional Protocol I'), arts 86(2), 87; ICTY Statute (n 50), art 7(3); Rome Statute (n 1), art 28; ICRC Customary IHL Study (n 61) rr 152–53. Article 28 of the Rome Statute applies a 'should have known' standard to military commanders and a stricter 'consciously disregarded' standard to civilian superiors.

²²⁹ *In re Yamashita* 327 US 1 (1946) 14–16; *Prosecutor v Delalić* (Judgment) IT-96-21-T (16 November 1998) [330]–[400]; *Prosecutor v Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08-3343 (21 March 2016) [170]–[213]. The conviction in *Bemba* was reversed on appeal on grounds that did not call into question the existence of the doctrine; see *Prosecutor v Bemba Gombo* (Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute') ICC-01/05-01/08-3636-Red (8 June 2018).

²³⁰ *Prosecutor v Hadžihasanović* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) IT-01-47-AR72 (16 July 2003) [11]–[31], confirming the customary status of command responsibility in non-international armed conflict.

other than the international courts themselves.²³¹

The third feature is the converse principle reflected in Article 33 of the Rome Statute, which provides that superior orders do not relieve a person of criminal responsibility, save where the person was under a legal obligation to obey, did not know that the order was unlawful, and the order was not manifestly unlawful; orders to commit genocide or crimes against humanity are deemed manifestly unlawful.²³² Command responsibility and the limitation of the superior-orders defence together produce a tightly coupled system, in which those who give orders answer for their consequences and those who carry them out answer for their own conduct; the same customary criminalisation extends to conduct in non-international armed conflict.²³³ The survival of functional immunity for the most senior officials would undermine that system, since it would entail that the higher an official's rank, the lower his or her exposure to criminal responsibility, a result that would invert the hierarchy of responsibility on which the law of armed conflict is built.

Beyond IHL, the same logic explains a boundary that the framework draws and that current practice observes, namely the asymmetry between criminal and civil proceedings. In the criminal context, international law has conferred jurisdictional rules co-extensive with the immunity;²³⁴ in the civil context, it has not.²³⁵ Article 14 of the Convention against Torture, although it requires states to ensure redress for victims, contains no jurisdictional regime equivalent to the criminal obligation to prosecute or extradite.²³⁶ That is why the ICJ held, in *Jurisdictional Immunities*, that state immunity survives in civil proceedings even in respect of grave violations, a conclusion that the European Court of Human Rights has reached in parallel,²³⁷ and why the refusal of the Italian Constitutional Court to give effect to the ICJ's

²³¹ ICRC Customary IHL Study (n 61) rr 152–53.

²³² Rome Statute (n 1), art 33; ICTY Statute (n 50), art 7(4); Nuremberg Principles (n 50), Principle IV. Unlike art 33 of the Rome Statute, art 7(4) of the ICTY Statute admits superior orders only in mitigation of punishment.

²³³ *Tadić* Jurisdiction Decision (n 61) [128]–[137].

²³⁴ Convention against Torture (n 3), arts 5–7; Geneva Convention I (n 52), art 49; Geneva Convention IV (n 52), art 146; Enforced Disappearance Convention (n 54), arts 9, 11; Akande and Shah (n 5) 841–42.

²³⁵ *Jones* (HL) (n 2) [25] (Lord Bingham), observing that ‘article 14 of the Torture Convention does not provide for universal civil jurisdiction’, in contrast with its ‘much more detailed provisions governing the assumption and exercise of criminal jurisdiction’; Akande and Shah, ‘Rejoinder’ (n 43) 861.

²³⁶ Convention against Torture (n 3), art 14; Lorna McGregor, ‘Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty’ (2007) 18 EJIL 903. The Committee against Torture has read art 14 as having extraterritorial reach, but that reading has not been accepted in state practice; see Committee against Torture, ‘General Comment No 3 (2012): Implementation of Article 14 by States Parties’ (13 December 2012) UN Doc CAT/C/GC/3, para 22.

²³⁷ *Jurisdictional Immunities* (n 1) [81]–[97]; *Al-Adsani* (n 41) [61], [66]; *Jones v United Kingdom* (n 36) [195]–[215].

judgment has remained so contested.²³⁸ The asymmetry is sometimes criticised as arbitrary, on the view that, if the gravity of torture defeats immunity in a criminal court, it should equally defeat it in a civil one.²³⁹ The displacement framework supplies the answer that the gravity-based account cannot.²⁴⁰ What defeats immunity is never gravity as such, but the presence of a jurisdictional rule co-extensive with it, and the criminal regimes contain such a rule whereas the civil regimes do not. It follows that the assimilation of civil and criminal proceedings for immunity purposes by the European Court of Human Rights in *Sassi and Benchellali* is, with respect, unpersuasive.²⁴¹ As mentioned in the introduction, the article does not otherwise engage with civil immunity, which has generated its own extensive literature, much of it concerned with the right of access to a court.²⁴²

4.4 Hybrid Tribunals and Personal Immunity

The final problem is hybridity. The *Jordan* Appeal Judgment of 2019 declared, in reasoning that has attracted heavy criticism, that customary international law recognises no immunity *ratione personae* for a head of state before an international criminal court.²⁴³ Whatever its merits as an account of custom, the reasoning was carried forward by Pre-Trial Chamber II in the *Mongolia* Decision of October 2024, which found that Mongolia had failed to comply with its obligations by not arresting President Putin and held that personal immunity, including that of heads of state, is not opposable in proceedings before the Court.²⁴⁴

²³⁸ Corte costituzionale, *Sentenza* 238/2014 (22 October 2014) [3.1]–[3.5]; see Valentina Volpe, Anne Peters and Stefano Battini (eds), *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014* (Springer 2021). The Constitutional Court grounded its refusal in the right of access to justice under arts 2, 24 of the Italian Constitution, treated as a counter-limit (*controlimit*) to the incorporation of the international rule.

²³⁹ See e.g., Orakhelashvili, 'State Immunity and Hierarchy of Norms' (n 30); Orakhelashvili, 'Reply' (n 41) 854, finding it 'difficult to see what makes civil cases so special as to prevent the primacy of jus cogens that obtains in criminal cases'; McGregor (n 236); *Al-Adsani* (n 41), Joint Dissenting Opinion of Judges Rozakis and Caflisch.

²⁴⁰ See Akande and Shah, 'Rejoinder' (n 43) 861, suggesting that 'it is more clearly established that international law confers extra-territorial jurisdiction in criminal proceedings than in civil proceedings'.

²⁴¹ *Sassi and Benchellali* (n 71) [53], [61], [65].

²⁴² See e.g., Fox and Webb (n 2); McGregor (n 236).

²⁴³ *Jordan* Appeal Judgment (n 180) [113]–[117]. For criticism, see Dov 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); Dapo 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/>> accessed 9 September 2026.

²⁴⁴ *Mongolia* Decision (n 10) [20], [27]–[28], [36]; for criticism, see Keiichiro Kawai, 'The ICC's Turn to Cynical Solipsism: The PTC II's Finding of Mongolia's Non-compliance in the Case against Putin' (*EJIL: Talk!*, 26 November 2024) <<https://www.ejiltalk.org/the-iccs-turn-to-cynical-solipsism-the-ptc-iis-finding-of-mongolias-non-compliance-in-the-case-against-putin/>> accessed 24 September 2026. The Chamber framed the question as

Whether the *Jordan* logic extends to a hybrid tribunal such as the Special Tribunal is the open question,²⁴⁵ and the displacement framework supports the extension only with qualification. The displacement of personal immunity sets a higher threshold than that of functional immunity, and it is most defensible where the tribunal exercises an authority that the contracting states could not have exercised individually. This is the point that the *Jordan* Appeals Chamber had in mind in denying any analogy between the relations of two states and those between a state and an international court.²⁴⁶ The criticism of that reasoning nonetheless has force, since the Appeals Chamber asserted the inapplicability of personal immunity before international courts without identifying its customary basis, and did so in a situation in which the Court's jurisdiction rested on a Security Council referral that could itself have supplied the answer.²⁴⁷ Applied to the Special Tribunal, this analysis yields a conclusion more nuanced than either pole of the debate allows. The territorial jurisdiction on which the Tribunal rests undoubtedly displaces the functional immunity of those within its reach; its capacity to displace personal immunity is more doubtful, and the suspension effected by Article 23(5) is best read as an acknowledgement of that doubt rather than as a lack of ambition.²⁴⁸ If and when the question is forced, whether by an incumbent's loss of office or otherwise, the case for trial will depend on whether the Tribunal can by then claim a properly international jurisdiction, a claim that its founders evidently hope to strengthen as further states join the Enlarged Partial Agreement.²⁴⁹

In light of the foregoing, it is possible to conclude that the displacement framework, as refined here, is broader than its 2010 formulation, while remaining unchanged in its core. Functional immunity is displaced wherever a jurisdictional rule contemplating the prosecution of officials has been conferred, whether by treaty, by custom, or by the constituent instrument of an international or hybrid tribunal. Rank is irrelevant. Senior officials enjoy the immunities of office while in office, but no residual functional immunity once they have left it.²⁵⁰ Whether a tribunal may disapply personal immunity depends on whether it exercises a properly international jurisdiction, a test met unambiguously by the ICC and more debatably by the

one concerning the obligations of States Parties under art 27, rather than revisiting the customary analysis.

²⁴⁵ Heller, 'The *Jordan* Appeal' (n 151); Wenaweser and Alavi (n 154); Quéniévet (n 166).

²⁴⁶ *Jordan* Appeal Judgment (n 180) [114]–[115].

²⁴⁷ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; Akande, 'ICC Appeals Chamber Holds' (n 243).

²⁴⁸ STCoA Statute (n 14), arts 1, 23(5); Nuridzhanian (n 156).

²⁴⁹ Wenaweser and Alavi (n 154).

²⁵⁰ *Arrest Warrant* (n 24) [54], [61]; *Al-Assad* (n 13) [37]; BGH 2024 (*Ahmad H*) (n 11) [53].

Special Tribunal.²⁵¹ Throughout, the logic is constant, in that a later jurisdictional rule contemplating the prosecution of officials displaces the earlier immunity that would otherwise frustrate it.²⁵²

5 CONCLUSIONS

This article has shown that the framework of jurisdictional displacement has been confirmed, rather than overtaken, by the developments of the past decade and a half. The German Federal Court of Justice, in a series of decisions, has endorsed the proposition that the exercise of jurisdiction over war crimes and crimes against humanity is incompatible with a surviving functional immunity,²⁵³ and has confirmed that this holds regardless of rank.²⁵⁴ The plenary assembly of the French Court of Cassation has drawn the very line that the framework predicts, denying functional immunity for international crimes²⁵⁵ while preserving the personal immunity of a serving head of state before national courts.²⁵⁶ The ILC, though proceeding by a more inductive method, has adopted in draft article 6 a provision best read as resting on displacement logic, as its own Drafting Committee came close to acknowledging in 2025.²⁵⁷ Practice in the Netherlands, Sweden and Switzerland, and before the Extraordinary African Chambers, points in the same direction.²⁵⁸ Meanwhile, the continuing controversy over *Sentenza* 238/2014 has exposed the weakness of the *jus cogens* hierarchy theory,²⁵⁹ and the post-*Pinochet* case law on torture has shown the artificiality of the non-official-act theory.²⁶⁰ Accordingly, of the rival accounts, only displacement maintains its explanatory power.

Nevertheless, the framework was unfinished, and the three refinements proposed here respond to problems that recent practice has exposed and that the original formulation could not resolve on its own terms. First, the aggression problem calls for a generalisation of the displacement logic, whereby the relevant relationship obtains between any specific jurisdictional rule and the immunity that would frustrate it, whether that rule is universal or particular, and whether it is exercised by the courts of the victim state or through an internationalised tribunal. Secondly,

²⁵¹ *Jordan Appeal Judgment* (n 180) [113]–[117]; *Mongolia Decision* (n 10); STCoA Statute (n 14), arts 1, 23(5).

²⁵² Akande and Shah (n 5) 841; cf BGH 2021 (n 11); BGH 2024 (*Ahmad H*) (n 11) [53].

²⁵³ BGH 2021 (n 11).

²⁵⁴ BGH 2024 (*Ahmad H*) (n 11) [53]; BGH 2024 (*Anwar R*) (n 11).

²⁵⁵ *Mayaleh* (n 12).

²⁵⁶ *Al-Assad* (n 13) [43].

²⁵⁷ ILC 2026 Report (n 15), draft art 6; Drafting Committee Statement 2025 (n 86) 5.

²⁵⁸ See section 2.2.

²⁵⁹ *Sentenza* 238/2014 (n 238); *Jurisdictional Immunities* (n 1) [92]–[97].

²⁶⁰ *Pinochet (No 3)* (n 8); *Jones* (HL) (n 2) [19] (Lord Bingham), [85] (Lord Hoffmann).

the rank problem must be resolved against any residual functional immunity for senior officials, since command responsibility and the limitation of the superior-orders defence leave no room for rank-based differentiation in responsibility for international crimes.²⁶¹ Functional immunity survives in civil proceedings such as *Ziada* because no co-extensive civil jurisdictional rule displaces it, not because of the defendants' rank.²⁶² Even the Malabo Protocol, which shields serving senior officials, preserves no residual functional immunity once they have left office.²⁶³ Thirdly, the hybridity problem is the most contested. The *Jordan* Appeal Judgment and the *Mongolia* Decision confirm that personal immunity is not opposable before the ICC, on the basis of a customary analysis criticised even by those sympathetic to the result, and the refinement proposed here would extend that analysis only to tribunals exercising a properly international jurisdiction.²⁶⁴

Three implications follow for the work of codification. First, the inclusion of aggression in draft article 6 is to be welcomed, but its justification lies in the theoretical logic of the provision rather than in any sudden accumulation of state practice.²⁶⁵ To exclude the supreme international crime while listing the others would introduce a hierarchy among the gravest crimes that neither Nuremberg nor Rome supports.²⁶⁶ Secondly, as the General Assembly considers the Commission's recommendation that a convention be elaborated on the basis of the draft articles, the displacement framework suggests that such a convention would be most coherent if understood as confirming the effect of existing jurisdictional rules, rather than as creating new exceptions to immunity. The procedural safeguards in Part Four of the draft articles, which apply whenever the forum state considers the application of draft article 6, would then operate as guarantees of good faith in the exercise of an existing jurisdiction rather than as conditions of a novel one.²⁶⁷ Thirdly, the framework offers those negotiating such a convention a principled criterion for deciding which crimes to include and how to design the accompanying safeguards, since the question in each case is whether a jurisdictional rule

²⁶¹ Rome Statute (n 1), arts 28, 33; Additional Protocol I (n 228), arts 86–87; ICRC Customary IHL Study (n 61) rr 152–53.

²⁶² *Ziada* (n 211).

²⁶³ See section 4.2.

²⁶⁴ *Jordan* Appeal Judgment (n 180) [113]–[117]; *Mongolia* Decision (n 10).

²⁶⁵ Grossman Guilloff (n 84), paras 40–46; ILC 2025 Report (n 85), para 121; Deng (n 84).

²⁶⁶ Global Institute for the Prevention of Aggression, 'Letter to the International Law Commission Regarding Draft Article 7 of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction' (6 May 2025).

²⁶⁷ ILC 2026 Report (n 15), draft arts 7–17; Drafting Committee Statement 2026 (n 15), noting that the Committee considered, but did not adopt, an express reference to decisions of international courts 'particularly in relation to the crime of aggression', leaving the matter to the commentary.

contemplating the prosecution of officials has been conferred.

As for the Special Tribunal, its suspension of personal immunity is a prudential expedient that a consolidating international character may in time render unnecessary.²⁶⁸ Ultimately, the analysis here has contributed to knowledge by clarifying that the protection which functional immunity once afforded to those who commit international crimes on behalf of the state is not being removed through a wholesale rejection of immunity, but through the progressive conferral of jurisdictional rules that displace it.

²⁶⁸ STCoA Statute (n 14), art 23(5); Quéniwet (n 166).