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

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ABSTRACT

This paper addresses the conceptual fragmentation underlying the recent wave of domestic and international jurisprudence narrowing the functional immunity (immunity *ratione materiae*) of foreign state officials. It argues that the relationship between official immunity and international crimes is governed by a single, unified principle of jurisdictional displacement. Under this framework, immunity yields not because international crimes are conceptually “private” acts, nor because the underlying prohibitions possess a *jus cogens* character, but because international law has conferred a specific rule of criminal jurisdiction that inherently contemplates the prosecution of state actors. Consequently, the later jurisdictional rule must be interpreted as having structurally displaced the prior rule of immunity. Specifically, the paper addresses the crime of aggression, demonstrating that once displacement is uncoupled from the strict requirement of universal jurisdiction, the territorial jurisdiction of a state can successfully displace functional immunity for leadership crimes. Additionally, it dismantles the brief, rank-based qualification that entered German jurisprudence, proving it irreconcilable with the customary architecture of command responsibility under international humanitarian law. And finally, it resolves the hybridity problem by assessing the capacity of internationalised tribunals to suspend or override the personal immunity (immunity *ratione personae*) of serving leaders. Ultimately, through a sustained engagement with the jurisprudence of the German Federal Court of Justice, the head-of-state enforcement practices of the International Criminal Court, and the territorial architecture of the newly established Special Tribunal for the Crime of Aggression against Ukraine, the paper demonstrates how these seemingly distinct developments coalesce into a coherent structural shift that fundamentally reorders the relationship between state sovereignty and individual accountability within the contemporary law of armed conflict.

Keywords: functional immunity; crime of aggression; international humanitarian law; hybrid criminal tribunals; ILC Draft Article 7.

I. INTRODUCTION

The international law of immunity sits at the meeting point of two commitments that pull in opposite directions, the sovereign equality of states and the individual accountability of those who govern them. For most of its modern history, that meeting point has been mediated by a deceptively simple proposition: that the official acts of one state cannot be adjudicated in the courts of another. In recent years, this proposition has come under sustained pressure from two directions. It has been pressed from above by treaty regimes and customary norms that criminalise certain official conduct, and from below by national courts willing to entertain prosecutions of foreign officials for genocide, crimes against humanity, war crimes, torture, and enforced disappearance.

The most rigorous theoretical defence of the resulting accommodation between immunity and accountability frames the question in terms of jurisdictional displacement.¹ 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 a suit against the official is in substance a suit against the state—are not overcome by the *jus cogens* character of the prohibition in question, nor by the fiction that international crimes are necessarily private acts. Immunity *ratione materiae* is displaced where, and only where, international law has conferred a rule of extraterritorial criminal jurisdiction that is practically co-extensive with the immunity that would otherwise apply.² The *Pinochet* outcome rests not on the impossibility of treating torture as an official act but on the fact that the Torture Convention’s *aut dedere aut judicare* regime would be deprived of all practical meaning if immunity *ratione materiae* survived. Nonetheless, the doctrinal terrain has been changed since that account was first advanced. The International Criminal Court has issued arrest warrants against the leaders of two states not party to the Rome Statute, Russia and Israel,³ and found Mongolia in breach for failing to arrest President Putin.⁴ The German Federal Court of Justice rejected functional immunity for the

¹ Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2010) 21 *European Journal of International Law* 815, 825–52.

² *ibid* 839–47.

³ *Situation in Ukraine*, ICC Press Release, ‘ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’ (17 March 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>; *Situation in the State of Palestine*, ICC Press Release, ‘Pre-Trial Chamber I Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024), <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>. The warrants are the first the Court has issued against the serving head of state of a permanent member of the Security Council and against a sitting head of government.

⁴ See *Prosecutor v Putin*, Decision on Mongolia’s Non-Compliance, ICC-01/22, Pre-Trial Chamber II (24 October 2024) [25]–[35].

war crime of torture by an Afghan officer, at first confining its holding to subordinate officials and then, in 2024, abandoning that limitation.⁵ Alongside these, the International Law Commission has provisionally adopted, on second reading, a revised Draft Article 7 adding the crime of aggression to those for which immunity *ratione materiae* does not apply;⁶ and on 25 June 2025, the Council of Europe and Ukraine signed the agreement establishing the Special Tribunal for the Crime of Aggression against Ukraine.⁷

These developments are not merely additional grist for the mill. Each throws into relief a question that the displacement view, as so far articulated, either evaded or could not on its own terms answer. The aggression problem is the most obvious. The original exposition accepted that universal jurisdiction does not extend to aggression, so that the displacement analysis could not be invoked to lift immunity in that context.⁸ Yet, an internationalised tribunal has now been established to disable the immunities of the Russian and Belarusian troikas. If the Kampala understandings forbid national jurisdiction over aggression, can a tribunal established through an international organisation succeed where domestic courts cannot, and on what basis? The rank problem is subtler: the German Federal Court of Justice initially confined its no-immunity holding to subordinate officials, in language criticised as a source of vagueness,⁹ even as the Federal Public Prosecutor had argued for an unqualified rule. The hybridity problem cuts the same way from the other end. If the Special Tribunal is not an international tribunal in the Nuremberg or ICTY sense, can it nevertheless reach the immunities of sitting heads of state, and by virtue of what feature of its constitution?

The paper argues that the relationship between functional immunity and international crimes is best understood as one of jurisdictional displacement, and that 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,

⁵ Bundesgerichtshof, judgment of 28 January 2021, 3 StR 564/19, and decision of 21 February 2024, AK 4/24.

⁶ See International Law Commission, 'Statement of the Chair of the Drafting Committee: Immunity of State Officials from Foreign Criminal Jurisdiction' (ILC, 76th session, 2025).

⁷ See Agreement between Ukraine and the Council of Europe on the Establishment of the Special Tribunal for the Crime of Aggression against Ukraine (Strasbourg, 25 June 2025) ('STCoA Agreement').

⁸ Akande and Shah (n 1) 836–37 (conceding that the analysis does not reach aggression, since no universal jurisdiction over that crime exists).

⁹ See Bundesgerichtshof (n 5) [23], [35]. For the criticism of this reservation as a source of vagueness, 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/>.

whether that rule is universal or territorial, customary or conventional, and whether it is exercised by a national court or by the constituent instrument of an international or hybrid tribunal. Personal immunity is not so displaced, because no co-extensive rule reaches it, save before a tribunal exercising a properly international jurisdiction. Consequently, three conclusions follow, which the paper defends in turn. The first is that an internationalised tribunal may reach the functional immunity of those accused of aggression even though no state could prosecute them. The second is that rank is irrelevant to the displacement of functional immunity. And the third is that 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.¹⁰

Following this introduction, Part II sets out the displacement framework, distinguishes it from the non-official-act, normative-hierarchy and implied-waiver theories it displaces, and traces its reception in the German Federal Court of Justice and the International Law Commission. Part III turns to the crime of aggression, explaining why a leadership crime carrying no universal jurisdiction has resisted the displacement analysis, and showing how the Statute of the Special Tribunal for the Crime of Aggression against Ukraine derives its treatment of immunity from its territorial foundation. Part IV addresses rank and hybridity, arguing that international humanitarian law bridges functional immunity and individual responsibility, that command responsibility leaves no room for a rank-based qualification, and that displacing a serving leader's personal immunity turns on whether the tribunal is properly international. Finally, Part V concludes by drawing out the implications for Draft Article 7 and the Special Tribunal.

II. THE DOCTRINAL ARCHITECTURE OF THE NO-IMMUNITY RULE

A. THE DOCTRINAL QUESTION AND THE DISPLACEMENT FRAMEWORK

The displacement framework is most easily grasped against the rival arguments it has supplanted. A serving head of state, head of government or minister for foreign affairs enjoys immunity *ratione personae*, a complete personal immunity that falls away on leaving office; every official, by contrast, enjoys immunity *ratione materiae* for acts performed in an official

¹⁰ See Bundesgerichtshof (n 5) [21]–[35]; 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/>.

capacity, an immunity that attaches to the act and survives the end of tenure.¹¹ It is the second of these that the no-immunity rule concerns, and by 2010 three principal arguments held the field. The first, which received its highest-profile endorsement in Lord Browne-Wilkinson's leading speech in *Pinochet (No 3)*, held that international crimes are not official acts at all, torture being by definition contrary to a state's authority under international law and so incapable of counting as an exercise of that authority for the purposes of immunity.¹² The second, exemplified by the Italian Court of Cassation's *Ferrini* line of authority and a flotilla of scholarly contributions, posited a normative hierarchy, on which the peremptory prohibitions of torture, genocide and crimes against humanity must prevail over the ordinary, non-peremptory rule that confers immunity.¹³ The third, less developed, held that a state acting in flagrant breach of international law had impliedly waived its immunity.

Each of these arguments has been found wanting on grounds that subsequent jurisprudence has largely vindicated.¹⁴ The non-official-act argument sits uneasily with the very definition of torture in Article 1 of the 1984 Convention, which requires that the conduct be inflicted by or with the consent or acquiescence of a public official or other person acting in an official capacity. To insist that such conduct must nonetheless be a private act for the purposes of immunity is a sleight of hand. The implied waiver argument founders on the plain point that immunity is asserted at a stage of proceedings at which the underlying allegation has not yet been established.¹⁵ And the proposition that an official's conduct may be attributed to the state for the purpose of responsibility while being denied that character for the purpose of immunity has been a fixture of the law since the rejection of an act-of-state plea in the *Eichmann* proceedings.¹⁶

¹¹ The 'troika' comprises the serving head of state, head of government and minister for foreign affairs, who enjoy immunity *ratione personae* during their tenure: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 [51], [53]–[54] ('*Arrest Warrant*'). The category is narrow and, at customary law, exhaustive, though the position of other officials on special mission has been left open.

¹² *R v Bow Street Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL) 198–203 (Lord Browne-Wilkinson). The litigation had an earlier instalment, *Pinochet (No 1)* [2000] 1 AC 61, set aside on grounds of apparent bias, so the seven-judge reasoning in *Pinochet (No 3)* governs. The members of the Committee divided in their reasoning, several resting the result on the implementation of the Torture Convention in domestic law rather than on any general theory of immunity.

¹³ *Ferrini v Federal Republic of Germany*, no 5044/2004 (Italian Court of Cassation, 11 March 2004) [9]–[11]; Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18 *European Journal of International Law* 955, 960–70. The *Ferrini* approach was disapproved at the inter-state level in the *Jurisdictional Immunities* case, though it survives in Italian constitutional practice.

¹⁴ See Akande and Shah (n 1) 831–32 (on the difficulties of the non-official-act argument).

¹⁵ *ibid* 829.

¹⁶ See *Attorney-General of the Government of Israel v Eichmann* (District Court of Jerusalem, 12 December 1961) [28]–[30], *aff'd* (Supreme Court of Israel, 29 May 1962). On the distinctness of state and individual responsibility,

The deepest objection concerns the normative-hierarchy theory, which retains a powerful intuitive appeal. The intuition is that a peremptory norm, being hierarchically superior, must override an ordinary rule with which it collides. The difficulty is that there is no collision, for the prohibition of torture and the rule conferring immunity address different questions: the first tells us that torture is unlawful and entails individual responsibility, the second whether a particular forum may adjudicate a particular defendant's conduct at a particular time.¹⁷ A rule about what may be done and a rule about who may judge it operate at different levels, and the priority of the one over the other does not arise. This is why the International Court of Justice was right to insist, in the *Arrest Warrant* case, that immunity from jurisdiction does not entail impunity.¹⁸ The displacement view locates the defeat of immunity not in the rank of the norm breached but in the structure of the jurisdictional regime erected around it. The peremptory character of the core crimes is not irrelevant, for it explains why states have been willing to confer jurisdiction over them; but it does the wrong work if asked to defeat immunity directly, and the right work once understood as the reason for the conferment that does the defeating.

In place of these rationales, the displacement framework offers a positive account. The substantive function of functional immunity, which gives effect to the principle that an official's acts are imputable to the state, has been overtaken by international criminal law's foundational principle that official position confers no exemption from criminal responsibility.¹⁹ The procedural function, which guards against the circumvention of state immunity through proceedings against those who acted for the state, has been overtaken by something else.²⁰ The development of rules conferring extraterritorial criminal jurisdiction

see Marina Spinedi, 'State Responsibility v Individual Responsibility for International Crimes: Tertium Non Datur?' (2002) 13 *European Journal of International Law* 895; cf International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, General Assembly Resolution 56/83 (12 December 2001), art 58.

¹⁷ *ibid* 826–27 (distinguishing the substantive and procedural functions of functional immunity).

¹⁸ *Arrest Warrant* (n 11) [60] (immunity from jurisdiction 'does not mean that they enjoy impunity'). For detailed discussions and analysis, see Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) 13 *European Journal of International Law* 853, 862–66; Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v Belgium Case' (2002) 13 *European Journal of International Law* 877.

¹⁹ Charter of the International Military Tribunal (Nuremberg) (London, 8 August 1945) 82 UNTS 279, art 7; Charter of the International Military Tribunal for the Far East (Tokyo, 19 January 1946) art 6; Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (ILC, 1950), Principle III. The principle is now reflected in Article 27(1) of the Rome Statute and in Article 4(2) of the Statute of the Special Tribunal. The principle that crimes are committed by individuals, not abstract entities, lies at the centre of the Tribunal's reasoning: Judgment of the International Military Tribunal (Nuremberg, 1 October 1946).

²⁰ On the taxonomy of personal and functional immunity, and the limitation of the latter to acts performed in an official capacity, see International Law Commission, Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction with Commentaries, arts 4–6; *Arrest Warrant* (n 11) [51]–[55].

over international crimes—the grave breaches of the 1949 Geneva Conventions, torture under the 1984 Convention, and enforced disappearance under the 2006 Convention—presupposes national proceedings against the very officials who act for the state, and where that jurisdictional rule is practically co-extensive with the immunity, the only coherent reading is that the later rule has displaced the earlier.²¹

B. RECEPTION BY NATIONAL COURTS AND THE COMMISSION

The analysis here is rooted throughout in the law of armed conflict, because most of the relevant prosecutions—whether at Koblenz, Karlsruhe, Paris, The Hague, Stockholm or Strasbourg—concern conduct in hostilities.²² The most significant judicial endorsement to date is the 2021 judgment of the German Federal Court of Justice in the case of an Afghan army officer convicted by the Higher Regional Court of Munich for the war crime of torture.²³ Having raised the immunity question of its own motion, the court held, after a long analysis, that the prosecution of foreign subordinate state officials for war crimes and other offences of concern to the international community as a whole is permissible before national courts under customary international law.²⁴ Universal jurisdiction over war crimes, it reasoned, would be severely undermined if functional immunity were permitted to subsist,²⁵ a jurisdiction whose customary foundations are long settled.²⁶

The 2021 reasoning has been reinforced since. In February 2024, in the case of a Syrian member of the National Defence Forces accused of crimes against humanity, the same court reaffirmed without qualification that functional immunity does not bar the prosecution of crimes under international law, and did so independently of the rank of the perpetrator.²⁷ The

²¹ Akande and Shah (n 1) 839–40.

²² See, e.g., Higher Regional Court of Koblenz, judgment of 13 January 2022, 1 StE 9/19 (*Anwar R*), the first conviction worldwide for crimes against humanity committed by a Syrian state official; Higher Regional Court of Frankfurt, judgment of 30 November 2021, 5-3 StE 1/20 (*Taha Al J*).

²³ Bundesgerichtshof (n 5) (judgment of 28 January 2021), arising from the conviction of an Afghan officer by the Higher Regional Court of Munich. The Federal Public Prosecutor had argued for an unqualified rule; the court's treatment of the question, though raised of its own motion, is widely regarded as the most considered judicial endorsement of the rule to date.

²⁴ *ibid* [35]; German Practice in International Law (n 10).

²⁵ Bundesgerichtshof (n 5) [27]–[31] (customary universal jurisdiction over war crimes would be largely defeated were functional immunity to subsist). The court reasoned from the function of the grave breaches regime rather than from any hierarchy of norms.

²⁶ Universal jurisdiction over war crimes is well established in custom. See International Committee of the Red Cross, *Customary International Humanitarian Law* (ICRC IHL database) Rules 156–157. On the customary criminalisation of serious violations, see *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber, 2 October 1995) [96]–[137].

²⁷ Bundesgerichtshof, decision of 21 February 2024, AK 4/24 [53] (rejecting functional immunity for crimes under international law independently of the status or rank of the perpetrator). See also Aziz Epik and Julia Geneuss,

Al-Khatib judgments of the Higher Regional Court of Koblenz, against former Syrian intelligence officials, proceeded on the same premise, though immunity was never raised, the defendants having defected and being unable plausibly to claim to have acted on Syria's behalf.²⁸ Prosecutions of former Rwandan officials in France, of former Iraqi officials in the Netherlands, and of Bosnian Serb officials in Sweden and Norway have gone forward without serious entertainment of functional immunity.²⁹

The practice in France is more complicated. In January 2021, the Court of Cassation dismissed a complaint brought by two French nationals against former United States officials for torture at Guantánamo, holding that the officials enjoyed functional immunity for acts performed in the exercise of their functions.³⁰ The holding is in tension with the German jurisprudence and has been read as a regressive turn, though its reach is contested.³¹ The divergence is not a simple difference about state practice, for the two courts faced different scenarios. The German court dealt with a subordinate officer alleged to have tortured detainees during an armed conflict, conduct squarely within the grave breaches regime and so within the category the displacement framework predicts will be most amenable to a no-immunity holding. The French court dealt with former senior officials accused of authorising a policy of torture; because they had long left office, no immunity *ratione personae* was available to them, and the dismissal can only rest on functional immunity. What distinguishes the French case is not the doctrine but the framing, the court's reluctance to pass judgment on the policy of a friendly state by judging the officials who set it, a reluctance that, as Part IV argues, the framework does not support.

'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/>.

²⁸ Higher Regional Court of Koblenz (n 22). See also, 'To Each His Own: Immunities in International Law' (Syria Justice and Accountability Centre, 2 May 2024), <https://syriaaccountability.org/to-each-his-own-immunities-in-international-law/>. The Koblenz proceedings produced the first conviction anywhere for state torture as a crime against humanity.

²⁹ See, e.g., Cour d'assises de Paris, judgment of 7 July 2016 (*Pascal Simbikangwa*); District Court of The Hague, judgment of 14 October 2005, LJN AV1163 (*Frans van Anraat*); Stockholm District Court, judgment of 20 February 2017, B 3787-16 (*Mouhannad Droubi*).

³⁰ Cour de cassation, chambre criminelle, judgment of 13 January 2021, no 20-80.511 F-P+B+I, dismissing a complaint lodged by two former Guantánamo detainees of French nationality. The dismissal turned on functional immunity rather than on any want of jurisdiction.

³¹ See Leila Sadat, 'New Developments in State Practice on Immunity of State Officials for International Crimes' (2021) 25(18) *ASIL Insights* 1, <https://asil.org/insights/volume-25-issue-18/>; Tal Mimran, 'Immunity of State Officials from Criminal Jurisdiction: The Debate Continues' (EJIL: Talk!, 2025), <https://www.ejiltalk.org/immunity-of-state-officials-from-criminal-jurisdiction-the-debate-continues/>; Mathias Forteau, 'Immunities and International Crimes before the ILC: Looking for Innovative Solutions' (2018) 112 *AJIL Unbound* 22, 22–26.

That instability is mirrored at the level of codification. The Commission has had the topic before it since 2007, under three Special Rapporteurs.³² Kolodkin's reports were sceptical of any general exception; Escobar Hernández's identified a clear trend recognising exceptions for international crimes, and the Commission completed a first reading in 2022.³³ Draft Article 7, adopted in 2017 by a recorded vote, set out six crimes—genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearance—for which immunity *ratione materiae* shall not apply.³⁴ The current Special Rapporteur, Claudio Grossman Guiloff, proposed adding aggression, slavery and the slave trade, and at its 2025 session the Drafting Committee provisionally adopted, on second reading, a revised Draft Article 7 that includes all three.³⁵

The reaction of states has been mixed. A clear majority in the Sixth Committee now accepts the inapplicability of functional immunity to genocide, crimes against humanity and war crimes.³⁶ A smaller group, including Brazil, Israel, Japan, the Russian Federation, Saudi Arabia, the United Arab Emirates and the United States, continues to oppose the rule, citing an absence of state practice or a fear of harassment of foreign officials.³⁷ Germany accepts the exception as a norm *in statu nascendi* while urging caution.³⁸ At the other end, some states are unusually explicit in its favour; Austria has stated that no functional immunity exists for international crimes, aggression among them, even for members of the troika once they have left office.³⁹ The Commission's commentaries draw on the special character of the crimes,

³² Roman A Kolodkin (2007–2012), Concepción Escobar Hernández (2012–2023) and Claudio Grossman Guiloff (2023–2027) have served as Special Rapporteurs: see Roman A Kolodkin, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction' (10 June 2010) UN Doc A/CN.4/631, paras 56–60, 90–94; Concepción Escobar Hernández, 'Fifth Report' (14 June 2016) UN Doc A/CN.4/701, paras 200–46.

³³ The Commission adopted the full set of draft articles on first reading in 2022: International Law Commission, 'Report on the Work of its Seventy-Third Session' (2022) UN Doc A/77/10, ch VI, paras 70–139.

³⁴ International Law Commission, 'Report on the Work of its Sixty-Ninth Session' (2017) UN Doc A/72/10, ch VII; the provision was adopted by a recorded vote of 21 to 8, with 1 abstention, an unusual step at the Commission. A recorded vote is a rare event at the Commission and signalled divisions that the second reading has since had to manage.

³⁵ Claudio Grossman Guiloff, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction' (29 January 2025) UN Doc A/CN.4/780, paras 53–74 (proposing the inclusion of aggression, slavery and the slave trade); Statement of the Chair of the Drafting Committee (n 6). The Special Rapporteur grounded the additions in the peremptory character of the crimes concerned, extending rather than revising the architecture adopted in 2017.

³⁶ See '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/>.

³⁷ See International Law Commission, 'Immunity of State Officials from Foreign Criminal Jurisdiction: Comments and Observations Received from Governments' (2024) UN Doc A/CN.4/771 (containing, among others, the observations of the Russian Federation, the United States, Israel and Saudi Arabia opposing or qualifying draft art 7). The objections rest principally on the asserted paucity of state practice and on concerns about politically motivated prosecutions.

³⁸ Comments of the Federal Republic of Germany, in Comments and Observations (n 37).

³⁹ Austria's position is recorded in Comments and Observations (n 37). See also Amnesty International, 'Comments and Observations on the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction by the

individual responsibility, and the existence of jurisdictional regimes contemplating the prosecution of officials.⁴⁰

C. WHY DISPLACEMENT BEST EXPLAINS THE NO-IMMUNITY RULE

It must be stated that this paper does not try to resolve whether the rule in Draft Article 7 reflects *lex lata* or *lex ferenda*;⁴¹ its claim is the narrower one, that displacement best explains the no-immunity rule and reaches all three frontiers. It might be argued that, given the Commission's pluralist method, the theoretical contest has been overtaken, the displacement view being only one argument among several that the Commission has set aside in favour of an inductive identification of custom from a body of practice. But such an argument would be a mistake. The Commission's method, however well suited to its codifying mandate, does not dispose of the theoretical question.

The displacement thesis, that the growth of jurisdictional rules contemplating proceedings against state officials must be read as having impliedly displaced the prior rule of immunity, remains the most powerful in the field, for three reasons. First, it avoids the conceptual difficulties that have dogged its rivals, requiring no artificial classification of international crimes as private acts, no conflict between substantive and procedural norms, and no controversial implied waiver. Secondly, it addresses what the case law actually does, for when courts deny immunity in torture cases they do so by reference to the particular features of the Torture Convention's jurisdictional regime, not by reference to the *jus cogens* character of the prohibition at large.⁴² Thirdly, it yields intelligible criteria for telling apart the cases in which immunity has been displaced from those in which it has not. The displacement is plainest in regimes such as the Torture and Enforced Disappearance Conventions, where the offence is defined by reference to official capacity, so that the prosecution regime would be all but

International Law Commission' (8 April 2025), <https://www.amnesty.org/en/wp-content/uploads/2025/04/IOR4092142025ENGLISH.pdf>.

⁴⁰ Draft Articles with Commentaries (n 20), commentary to draft art 7, paras 4–13 (special character of the crimes) and 14–24 (state practice). The commentary treats the list as reflecting both the gravity of the crimes and the existence of regimes contemplating the prosecution of officials.

⁴¹ cf International Law Commission, 'Draft articles on Immunity of State Officials from Foreign Criminal Jurisdiction, with Commentaries' (2022) UN Doc A/77/10, ch VII, Commentary to Draft Article 7, paras 1–34; 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, 4–8.

⁴² *Pinochet (No 3)* (n 12) 247–48 (Lord Phillips, resting on the Torture Convention's jurisdictional regime rather than the peremptory status of the prohibition); *Bundesgerichtshof* (n 5) [27]–[32]. Lord Phillips's reasoning anticipates the displacement analysis, since the duty to prosecute under the Convention could not coexist with a surviving immunity. For the competing readings of the Law Lords, see also *Cassese* (n 18) 864–66.

meaningless if immunity survived; for other crimes—war crimes in international armed conflict, crimes against humanity, and genocide—the case is weaker but still defensible, on the ground that the jurisdictional rules contemplate the prosecution of those acting on behalf of states.⁴³ The Genocide Convention itself provides for trial by a territorial court or an international penal tribunal and denies any exemption to constitutionally responsible rulers, a structure that presumes the prosecution of officials.⁴⁴

The framework also answers an objection that has dominated the second reading. Several members and delegations argue that the practice supporting Draft Article 7 is too thin to sustain a customary rule, observing that in many of the prosecutions relied upon immunity was never argued, so that the absence of a plea cannot show that immunity did not apply.⁴⁵ The point is well taken as a matter of customary method, and the International Court of Justice has itself cautioned that a state must notify the forum before immunity can be treated as engaged.⁴⁶ But the objection tells against the inductive method, not the displacement view. 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 conferment of a co-extensive jurisdictional rule, whether or not any defendant raised the point. The silence of the case law is exactly what displacement predicts, for where immunity has already fallen by operation of law there is nothing to plead. The same analysis fixes the role of *jus cogens*: the Commission has leaned on the peremptory character of the crimes as the criterion of inclusion in Draft Article 7,⁴⁷ which is sound for deciding which crimes belong on the list but is not the ground on which immunity falls. Peremptoriness explains why states have conferred jurisdiction over these crimes; the conferment displaces the immunity. The two operate in

⁴³ Akande and Shah (n 1) 840–42; see also the Institut de Droit International, Naples Resolution, ‘The Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes’ (2009) arts II–III.

⁴⁴ 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 and VI (constitutionally responsible rulers are not exempt, and trial lies before a territorial court or an international penal tribunal), a structure that presumes the prosecution of officials.

⁴⁵ See Sean D Murphy (n 8) 4–8 and Mathias Forteau (n 30) 22–26. For a discussion on the broader debate, see Tal Mimran and Esther Halfon, ‘ILC Draft Articles on Immunity of State Officials: Codification or Progressive Development?’ (Lieber Institute West Point, 21 April 2026), <https://lieber.westpoint.edu/ilc-draft-articles-immunity-state-officials-codification-progressive-development/>.

⁴⁶ See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177 [196].

⁴⁷ On the criteria for inclusion in Draft Article 7, including the contested role of *jus cogens*, see Diego Uribe Bustamante, ‘Immunity of State Officials: A *Jus Cogens* Criteria for Draft Article 7?’ (EJIL: Talk!, 2025), <https://www.ejiltalk.org/immunity-of-state-officials-a-jus-cogens-criteria-for-draft-article-7/>.

sequence, not in competition.

The German court's 2021 judgment, though framed in the idiom of inductive custom, is best read as displacement reasoning in all but name.⁴⁸ Universal jurisdiction over war crimes, it held, could scarcely function if immunity continued to apply, because the structure of international humanitarian law presumes that war crimes will ordinarily be committed by state-affiliated combatants acting under state authority.⁴⁹ The Commission's own Drafting Committee said much the same in 2025, observing that where international law confers extraterritorial jurisdiction over official-capacity acts it would be logically inconsistent to allow functional immunity, while adding, in a passage to which Part III returns, that the non-application of immunity does not itself create jurisdiction.⁵⁰ The framework is thus not an argument codification has left behind but the infrastructure on which it rests; and that infrastructure, as the next two Parts show, is incomplete in three respects.

III. THE AGGRESSION PROBLEM

A. AGGRESSION AS THE SUPREME INTERNATIONAL CRIME

No sitting head of state has ever been prosecuted for the crime of aggression. The International Military Tribunal at Nuremberg famously called aggression the supreme international crime, differing from other war crimes only in that it contains within itself the accumulated evil of the whole.⁵¹ In the 80 years since, this supreme crime has attracted more theoretical attention and less practical enforcement than any of its lesser cousins. The reason is structural. Aggression is, in its definitional core, a leadership crime: its conduct element is the planning, preparation, initiation or execution of an act of aggression, defined by reference to the General Assembly's 1974 consensus,⁵² and under Article 8 bis(1) of the Rome Statute only a person able effectively to control or direct the political or military action of a state can commit

⁴⁸ Bundesgerichtshof (n 5) [29]; Claus Kreß, 'On Functional Immunity of Foreign Officials and Crimes under International Law' (Just Security, 18 May 2021) (reading the judgment as resting on the incompatibility of immunity with universal jurisdiction).

⁴⁹ Bundesgerichtshof (n 5) [29]–[31].

⁵⁰ Statement of the Chair of the Drafting Committee (n 6) (observing both that functional immunity cannot logically subsist where jurisdiction over official-capacity acts has been conferred and that the non-application of immunity does not itself create jurisdiction).

⁵¹ *Trial of the Major War Criminals before the International Military Tribunal: Proceedings* (Vol I, IMT 1947) 186 ('the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole').

⁵² See UN General Assembly Resolution 3314 (XXIX) (14 December 1974). Resolution 3314 enumerates the acts qualifying as aggression, the list incorporated by reference into the Kampala definition. See also Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 8 bis(2).

it.⁵³ Any prosecution of aggression therefore confronts the immunity of senior officials head on, and where the prosecution of a subordinate soldier can step around the rank problem, the prosecution of aggression cannot.

The structural consequence is familiar but bears restating in the setting of immunity. Earlier expositions of the displacement framework noted that no rule of universal jurisdiction over aggression exists and that its absence prevents the displacement analysis from operating in that setting.⁵⁴ The point was drawn from the Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, which maintained that the national courts of third states are not competent to determine whether another state has committed aggression, by virtue of the principle *par in parem non habet imperium*.⁵⁵ The position was confirmed at the Kampala Review Conference in 2010, which adopted an Understanding providing that 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.⁵⁶ The dormancy is the more striking because the substantive law has never been in doubt; at Nuremberg and Tokyo the major war criminals were convicted of crimes against peace, so that what has been missing is not the law but a forum competent to apply it to the leaders of a state that has not consented to be judged.⁵⁷

B. THE KAMPALA COMPROMISE AND THE JURISDICTIONAL GAP

The architecture of the Court's own jurisdiction compounds the difficulty. Article 15 bis(5) of the Rome Statute provides that the Court shall not exercise jurisdiction over aggression committed by a national of, or on the territory of, a state not party to the Statute,⁵⁸

⁵³ Rome Statute (n 52), art 8 bis(1), as inserted by Kampala Review Conference Resolution RC/Res 6 (11 June 2010): a leadership clause confining perpetration to those who control or direct state action. The leadership clause distinguishes aggression from the other Rome Statute crimes, which may be committed by persons of any rank.

⁵⁴ Akande and Shah (n 1) 836–37.

⁵⁵ International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind' (1996) UN Doc A/51/10, commentary to art 8, para 14 (national courts of third states not competent over aggression). The Commission rested the limitation on the principle of *par in parem non habet imperium*.

⁵⁶ Resolution RC/Res 6 (n 52) Annex III, Understanding 5 (the amendments create no right or obligation to exercise domestic jurisdiction over an act of aggression committed by another state). As a matter of treaty law the Understanding binds only the states that adopted it, though it reflects a wider acceptance of the point.

⁵⁷ At Nuremberg and Tokyo, the major war criminals were convicted of crimes against peace: *Trial of the Major War Criminals* (n 49) 171, 186. Individual responsibility for aggressive war has been settled ever since. The convictions show that individual responsibility for aggressive war is not novel; what is novel is the prospect of a standing forum to enforce it against the leaders of a non-consenting state.

⁵⁸ Rome Statute (n 52), art 15 bis(5) (no jurisdiction over aggression committed by a national of, or on the territory of, a non-State Party).

and that jurisdiction was in any event activated only prospectively, from July 2018.⁵⁹ For Russia, which withdrew its signature in 2016,⁶⁰ the consequence is plain: the Court has no jurisdiction over aggression in respect of the war in Ukraine, though it has jurisdiction over the war crimes and crimes against humanity that have flowed from it.⁶¹ The supreme international crime is thus the one international crime no permanent international court is presently competent to prosecute against the leaders most plausibly responsible for it.

This jurisdictional gap has driven the campaign for a special tribunal. Within weeks of the Russian invasion, leading scholars called for a tribunal whose specific purpose would be to fill the gap left by articles 5 and 15 bis(5).⁶² The proposals divided along a familiar line. One school favoured a tribunal created by a United Nations General Assembly resolution; a second favoured a regional tribunal established by treaty between Ukraine and either the European Union or the Council of Europe, with internationalised judges and prosecutors but a juridical character formally derived from Ukrainian sovereignty.⁶³ The first school argued that only a tribunal with the backing of the General Assembly would have the international character needed to displace the personal immunities of the troika; the second argued that the political cost of pursuing such a resolution was prohibitive and that a hybrid tribunal could achieve the same displacement.⁶⁴ Behind the disagreement lay a concern about legitimacy and selectivity,

⁵⁹ The Court's jurisdiction over aggression was activated only prospectively with effect from 17 July 2018. See Assembly of States Parties, *Activation of the Jurisdiction of the Court over the Crime of Aggression*, Resolution ICC-ASP/16/Res.5, Adopted at the 13th Plenary Meeting (14 December 2017).

⁶⁰ Russia communicated its intention not to become a party in 2016. See UN Depositary Notification C.N.886.2016.TREATIES-XVIII.10 (30 November 2016).

⁶¹ Ukraine, although was then not a State Party, accepted the Court's jurisdiction over crimes committed on its territory by two declarations under art 12(3) (in 2014 and 2015). Its instrument of accession was deposited on 25 October 2024 and entered into force on 1 January 2025. The accession does not cure the aggression gap, because Article 15 bis(5) turns on the status of the aggressor state.

⁶² See generally, Kevin Jon Heller, 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis' (2024) 26(1) *Journal of Genocide Research* 1; 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/>.

⁶³ See Carrie McDougall, 'Why Creating a Special Tribunal for Aggression against Ukraine is the Best Available Option' (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/>; Open Society Justice Initiative, 'Immunities and a Special Tribunal for the Crime of Aggression against Ukraine' (Briefing Paper, January 2023) 8–14, <https://www.justiceinitiative.org/uploads/eb4acc44-b7f3-4026-8c68-3f677a2c4b24/immunities-and-a-special-tribunal-for-ukraine-en-02012023.pdf>.

⁶⁴ See 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/>; 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/>.

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 shadowed international criminal law since Nuremberg. A resolution of the General Assembly, carrying the endorsement of the wider membership, was thought to answer that charge, and its political infeasibility, once the likely pattern of votes became clear, left the regional route as the one realistically open. The matter was carried forward by a Core Group of supporting states, whose work shaped the eventual framework.⁶⁵

C. THE SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE

The compromise that has emerged is closer to the second model. On 25 June 2025, President Zelensky and Secretary General Berset signed an agreement in Strasbourg,⁶⁶ establishing the Special Tribunal for the Crime of Aggression against Ukraine, with the Tribunal's Statute annexed.⁶⁷ The Tribunal has international elements, a Council of Europe management structure, internationalised judges and prosecutors, and the political endorsement of some three dozen states, but it does not claim to be an international tribunal in the strict Nuremberg or ICTY sense.⁶⁸ On the contrary, Article 1 of the Statute grounds the Tribunal's jurisdiction in the territorial jurisdiction of Ukraine, the drafters having chosen that footing deliberately so as to avoid the contested theory that an international tribunal may by its very nature displace immunities.⁶⁹

The Statute's treatment of immunity is the most instructive feature of the new arrangement. Article 4(2) restates the Nuremberg principle that official position shall not

⁶⁵ See 'Joint Statement of the Foreign Ministers Meeting on the conclusion of the work of the Core Group on the Establishment of a Special Tribunal for the Crime of Aggression against Ukraine' (Lviv, 9 May 2025), <https://webgate.ec.europa.eu/circabc-ewpp/d/d/workspace/SpacesStore/b6c0568c-5fbe-4dbb-9507-2ae71384c5be/download>.

⁶⁶ See Council of Europe, 'Council of Europe and Ukraine Sign Agreement Establishing the Special Tribunal for the Crime of Aggression against Ukraine' (25 June 2025), <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>

⁶⁷ STCoA Agreement (n 7); Gaiane Nuridzhanian, 'The Newly Established Special Tribunal for the Crime of Aggression against Ukraine: Jurisdiction, Immunities and Due Process' (17 July 2025) 8–18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5359650.

⁶⁸ 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/>.

⁶⁹ STCoA Agreement (n 7), art 1. See also 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/>. The authors explain that the territorial basis was chosen precisely to avoid resting the Tribunal on a contested theory of international jurisdiction.

relieve a person of criminal responsibility nor mitigate punishment, a formulation traceable to Article 7 of the Nuremberg Charter and restated in Article 27(1) of the Rome Statute.⁷⁰ As to immunity proper, the Statute draws the now-orthodox line between its two forms. Functional immunity is no bar: officials below the troika enjoy no immunity in respect of the crime, and the denial of any official-capacity defence in Article 4(2) leaves no room for a plea of immunity *ratione materiae*.⁷¹ Personal immunity is treated differently. By Article 23(5), where an indictment concerns a sitting head of state, head of government or minister for foreign affairs, the Pre-Trial Judge must not confirm it until the person leaves office or a waiver is presented, and Article 25(2) requires the proceedings to be suspended.⁷²

The triage is more restrictive than is sometimes supposed. For so long as a troika member remains in office, the Prosecutor may investigate, gather evidence and prepare a document setting out the charges, but the Pre-Trial Judge may neither confirm the indictment nor issue a warrant of arrest, and there can be no trial.⁷³ The compromise has been criticised from both directions. From one side it is said to perpetuate impunity for as long as the incumbent remains in power, because the officials most likely to bear responsibility for aggression are precisely those who tend to retain office for life.⁷⁴ From the other, it is said to reach further than international law allows, on the view that states not party to the constituting agreement retain a customary obligation to respect the immunities of the troika and cannot be required by a regional arrangement to do otherwise.⁷⁵

The Tribunal's institutional character invites comparison with the hybrid models that preceded it, though the comparison yields no bright line. The Special Court for Sierra Leone, created by treaty with the United Nations, was the most clearly international, its Appeals Chamber holding in *Taylor* that it exercised jurisdiction on behalf of the international

⁷⁰ STCoA Agreement (n 7), art 4(2); Rome Statute (n 52) art 27(1).

⁷¹ STCoA Agreement (n 7), art 23(4); cf Nuridzhanian (n 67) 12–16.

⁷² STCoA Agreement (n 7), arts 23(5) and 25(2); cf Noëlle Quénivet, '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/>. The provision suspends, rather than removes, the personal immunity of a serving troika member.

⁷³ STCoA Agreement (n 7), arts 23(5) and 25(2); Quénivet (n 72); Council of Europe, 'Special Tribunal for the Crime of Aggression against Ukraine: Frequently Asked Questions', <https://www.coe.int/en/web/special-tribunal-ukraine/frequently-asked-questions>.

⁷⁴ See Amnesty International, 'Ukraine: Establishment of the Special Tribunal for the Crime of Aggression Must Ensure Victims-Centred Justice' (14 May 2025), <https://www.amnesty.org/en/latest/news/2025/05/ukraine-establishment-of-the-special-tribunal-for-the-crime-of-aggression-must-ensure-victims-centered-justice/>.

⁷⁵ See, e.g., Comments of the Russian Federation, in Comments and Observations (n 37).

community.⁷⁶ The Extraordinary Chambers in Cambodia were the least; the Special Tribunal for Lebanon and the Kosovo Specialist Chambers occupy intermediate positions, their constitutive instruments varying widely in form and pedigree.⁷⁷ The Special Tribunal for Ukraine falls in the middle, closer to the Sierra Leone court than to the Cambodian chambers but without the Security Council pedigree some treat as decisive.⁷⁸ The comparison exposes the absence of any agreed criterion for the international character on which, as the next Part argues, the displacement of personal immunity turns, the law having never settled how much collective endorsement, and of what kind, is required to cross the threshold.⁷⁹

D. RECONCEIVING DISPLACEMENT FOR THE LEADERSHIP CRIME

What does the Tribunal tell us about the displacement framework? Three things. The first is that Article 4(2) of the Statute is not new doctrinal thesis. It restates the principle, common to Nuremberg and to Article 27 of the Rome Statute, that official position is no defence, and it pairs a substantive denial of the immunity defence with a procedural distinction between sitting and former officials.⁸⁰ The drafters were plainly alive to the two waves of jurisprudence the Court has had to negotiate, culminating in the *Jordan Appeal Judgment*'s controversial holding that customary international law contains no immunity *ratione personae* before an international criminal court,⁸¹ a holding reached only after the Court's earlier and much-criticised reliance on a customary exception to head-of-state immunity.⁸²

The second is that the framework as originally formulated cannot accommodate

⁷⁶ *Prosecutor v Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction (Appeals Chamber, 31 May 2004) [37]–[53] (the Court an 'international criminal court' exercising jurisdiction on behalf of the international community).

⁷⁷ cf Agreement and Statute of the Special Court for Sierra Leone (2002); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (2001, as amended 2004); Statute of the Special Tribunal for Lebanon, annexed to UNSC Res 1757 (30 May 2007); and the Law on Specialist Chambers and Specialist Prosecutor's Office (Kosovo) no 05/L-053 (2015).

⁷⁸ For the comparison, see Lobel and Milaninia (n 69); Heller (n 68).

⁷⁹ On the design debates and the question of international character, see 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>.

⁸⁰ STCoA Agreement (n 7), arts 4(2), 23(4)–(5); cf Rome Statute (n 52), arts 27, 98 (the relationship between irrelevance of official capacity and the duty to respect third-state immunities).

⁸¹ *Jordan Referral re Al-Bashir*, ICC-02/05-01/09-397-Corr (OA2), Appeals Chamber (6 May 2019) [113]–[117] ('*Jordan Appeal Judgment*').

⁸² The Court's jurisprudence developed in two phases: the early decisions rested on a customary exception to head-of-state immunity (*Prosecutor v Al Bashir*, ICC-02/05-01/09-139 (Malawi), 12 December 2011 [36]–[43]), an approach widely criticised, before the *South Africa* (ICC-02/05-01/09-302, 6 July 2017) and *Jordan* decisions recast the matter. The shift from the earlier customary-exception reasoning to the *Jordan* analysis is widely regarded as a significant, if contested, development.

aggression without modification. Its core claim is that immunity *ratione materiae* is displaced by a jurisdictional rule practically co-extensive with it.⁸³ But there is no co-extensive rule of universal jurisdiction over aggression; the Kampala Understanding affirmatively excludes one. As originally stated, the framework would therefore have no purchase on national prosecutions for aggression, as its author acknowledged.⁸⁴ Yet, the Tribunal exists precisely to disable immunity in respect of aggression, and the framework must say something about whether it succeeds. The answer lies in a refinement latent in the framework but never drawn out. The relevant co-extensiveness is not confined to the case where a customary universal jurisdiction would be deprived of meaning by the immunity. It holds between any specific jurisdictional rule, founded on universality, on treaty, on the consent of the territorial state, or on the authority of an international institution, and the immunity that would frustrate it. The paradigm is the Torture Convention's universal *aut dedere aut judicare* regime, but the same logic operates in narrower settings: the grave breaches regime of the 1949 Geneva Conventions is a treaty obligation on contracting parties, not a rule of universal jurisdiction, and the displacement is no less effective for being treaty-based.⁸⁵ The Drafting Committee drew the same line in 2025 in insisting that the non-application of immunity does not itself create jurisdiction, which must be established independently.⁸⁶

Applied to the Special Tribunal, the refinement yields a tidy result for functional immunity. Ukraine's territorial criminal jurisdiction over aggression committed on its soil contemplates the prosecution of the officials who commit the crime, and it displaces their functional immunity, exactly as articles 4(2) and 23(4) provide. Personal immunity 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 the *Arrest Warrant* case holds cannot override the immunity *ratione personae* of a serving troika member.⁸⁷ That is why the Statute suspends rather than abolishes personal immunity. On the displacement view, the Statute's architecture is not a muddle but a faithful application of the framework, and functional immunity falls because the territorial rule is co-extensive with it, and personal immunity

⁸³ Akande and Shah (n 1) 839.

⁸⁴ Akande and Shah (n 1) 836–37.

⁸⁵ Geneva Convention I, art 49; Geneva Convention II, art 50; Geneva Convention III, art 129; Geneva Convention IV, art 146 (the obligation to search for and prosecute or extradite); see the ICRC commentary on the grave breaches articles. The regime presupposes that the offenders will be members of the armed forces of an opposing state, that is, persons acting in an official capacity.

⁸⁶ Statement of the Chair of the Drafting Committee (n 6).

⁸⁷ *Arrest Warrant* (n 11) [51]–[55] (personal immunity is full while the official remains in office, even as regards war crimes and crimes against humanity). See also *Arrest Warrant* (n 11), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal [85].

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, for it was originally concerned only with immunity *ratione materiae*.⁸⁸ The extension is defensible only where the jurisdictional rule is exercised by a genuinely international institution rather than a national or nationally derived court. The reason is again co-extensiveness: universal jurisdiction exercised by foreign national courts in absentia would be grossly over-inclusive, displacing the personal immunities of every troika member of every state, whereas a regime exercised by an international tribunal established by states acting through an international organisation can be read as a collective decision to disable a defined set of immunities in defined cases. Kevin Jon Heller has argued that the breadth and depth of international endorsement, not the formal mode of constitution, is what matters.⁸⁹ The drafters took the more cautious path, grounding the Tribunal in Ukrainian territoriality and suspending personal immunity, precisely because they doubted a regional body could claim the requisite international character.⁹⁰ Two theories of international character compete here. On a delegation theory, an internationalised tribunal may exercise only the jurisdiction its creating states themselves possessed, so that a body built on Ukrainian territoriality can no more disable a third state's personal immunities than Ukraine could acting alone. On a representative theory, a tribunal sufficiently endorsed by the international community acts not as the delegate of its founders but on its behalf and may set aside immunities accordingly. The suspension worked by the Statute is intelligible on either view, which is part of its prudence. Which view prevails will be among the more consequential questions of institutional law in the coming decade.

IV. RANK, COMMAND AND THE LIMITS OF DISPLACEMENT

A. THE RANK QUESTION AND ITS RESOLUTION

The German court's 2021 judgment ought to have been the high-water mark of the displacement view. It rejected functional immunity for the war crime of torture in unequivocal

⁸⁸ Akande and Shah (n 1) 818–25 (immunity *ratione personae* lies outside the scope of the displacement analysis). The original analysis was careful to confine itself to functional immunity, leaving personal immunity to be governed by the ordinary customary rule. On the limits of universal jurisdiction in relation to immunities, see the Princeton Principles on Universal Jurisdiction (2001), Principle 5.

⁸⁹ Heller (n 64); Heller (n 68).

⁹⁰ Lobel and Milaninia (n 66); STCoA Agreement (n 7), art 1.

terms and drew approvingly on the leading sources of the displacement analysis.⁹¹ Yet it carried a phrase that clouded its reception, confining its conclusion to subordinate state officials in language that at least left open the possibility that high-ranking officials might retain a residual functional immunity denied to their subordinates.⁹² The Federal Public Prosecutor had argued that no such qualification was warranted, and the reservation was duly criticised as a source of vagueness in the doctrine.⁹³

The civil cases mark the limit. In civil proceedings over the 2014 Gaza conflict, the Hague Court of Appeal declined jurisdiction against a former Israeli defence minister and an air force commander, holding that their acts were attributable to the state and so retained functional immunity irrespective of the gravity alleged.⁹⁴ Because those proceedings were civil, the outcome is consistent with the asymmetry defended below, and the framework would resist only the carrying of that rationale into the criminal sphere, which is what a rank-based reservation would do.⁹⁵ The German court has since removed the doubt. In its decision of February 2024 it held, without qualification, that functional immunity does not bar the prosecution of crimes under international law independently of the status or rank of the perpetrator.⁹⁶ The brief ambiguity of 2021 has thus been resolved by the court that created it, and resolved in favour of the unqualified rule for which the Federal Public Prosecutor had contended.

B. WHY RANK IS IRRELEVANT UNDER THE DISPLACEMENT FRAMEWORK

The rank qualification has no warrant 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

⁹¹ Bundesgerichtshof (n 5) [23], [35]; Kreß (n 45).

⁹² *ibid* [23], [35] (confining the holding to *untergeordnete Funktionsträger*, subordinate officials).

⁹³ The Federal Public Prosecutor's argument for an unqualified rule, and the resulting vagueness of the Court's reservation, are discussed in German Practice in International Law (n 10). See also Schmid (n 9).

⁹⁴ *Ziada v Gantz and Eshel*, Court of Appeal of The Hague, judgment of 7 December 2021, ECLI:NL:GHDHA:2021:2374; upheld by the Hoge Raad (Supreme Court of the Netherlands), 25 August 2023, ECLI:NL:HR:2023:1132. The courts held that the officials' acts, performed in an official capacity, were attributable to the state and so protected by functional immunity in the civil proceedings.

⁹⁵ On the distinction between civil and criminal proceedings for the purposes of functional immunity, see 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/>.

⁹⁶ Bundesgerichtshof (n 5) [53].

whether it contemplates officials of a particular rank. The grave breaches regime of the 1949 Geneva Conventions draws no distinction between privates and generals; the Torture Convention's public-official test draws none between a junior interrogator and a ministerial supervisor.⁹⁷ If functional immunity is displaced for the one, it is displaced for the other.

The qualification makes the framework less coherent, for it implies that the principle of individual responsibility applies in full to subordinates while sparing those most likely to have ordered the crimes, which stands the international criminal law project on its head.⁹⁸ The proper means of addressing the genuine concerns raised by senior officials is not a rank-based qualification to 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 on their departure, whereupon no residual functional immunity stands in the way.⁹⁹ The rank reservation was, in this light, doctrinally redundant, because it operated precisely where personal immunity already applied.

C. INTERNATIONAL HUMANITARIAN LAW AS THE DOCTRINAL BRIDGE

The relationship between functional immunity and individual responsibility is worked out most clearly in international humanitarian law, three features of which bear on the displacement analysis. The first is that, since at least the Geneva Conventions of 1949, the law has assumed that those who commit grave breaches will be agents of the state; the obligation to search for and prosecute or extradite was framed on the express assumption that the persons concerned would be combatants in the armed forces of opposing states.¹⁰⁰ 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, codified in Article 28 of the Rome Statute and reflected in customary law, which holds commanders and civilian superiors responsible for the crimes of subordinates they knew or should have known of and failed to prevent or punish.¹⁰¹ The doctrine reaches back to the responsibility imposed on General Yamashita and

⁹⁷ 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, art 1.

⁹⁸ On the centrality of leadership responsibility, see the Nuremberg Principles (n 19), Principle III; Statement of the Chair of the Drafting Committee (n 6).

⁹⁹ See *Arrest Warrant* (n 11) [58].

¹⁰⁰ Jean S Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC IHL databases).

¹⁰¹ Rome Statute (n 52), art 28; International Committee of the Red Cross (ICRC), *Customary International*

has been elaborated from the *Čelebići* trial chamber to the International Criminal Court.¹⁰² It is structurally incompatible with any rank-based qualification, for if a subordinate soldier may be prosecuted for a war crime, his commander may be prosecuted for the same conduct as a superior, and the logic runs up the chain to the senior leadership.¹⁰³ A commander criminally responsible for failing to prevent his subordinates' crimes cannot at the same time claim that those crimes, as part of his official function of command, are shielded by his rank, and the customary status of the doctrine leaves no room for the contrary view.¹⁰⁴ To accept a residual immunity for senior commanders would make Article 28 a dead letter in every forum but the Court itself.¹⁰⁵

The third feature is the converse insight reflected in Article 33 of the Rome Statute, which abolishes superior orders as a complete defence save for war crimes the subordinate did not know to be unlawful.¹⁰⁶ Command responsibility and the superior-orders limitation together produce a tightly coupled system in which those who give orders answer for the consequences and those who carry them out answer for their actions; the same customary criminalisation extends to conduct in non-international armed conflict.¹⁰⁷ A functional immunity surviving at the top would unravel that system, making it the case that the higher one's rank, the less one's exposure to responsibility, a result as incoherent doctrinally as it is indefensible morally. The same logic explains a boundary the framework draws and that current practice observes: the asymmetry between criminal and civil proceedings. In the criminal context, international law has conferred jurisdictional rules co-extensive with the immunity; in the civil context it has not, for Article 14 of the Torture Convention, though it requires a right to compensation, contains no jurisdictional regime equivalent to the criminal obligation to prosecute or extradite.¹⁰⁸ That is why the International Court of Justice could hold in the *Jurisdictional*

Humanitarian Law (ICRC IHL database), Rule 153 (command responsibility).

¹⁰² *In re Yamashita* 327 US 1 (1946) 14–18 (responsibility of a commander for failing to control his troops); the modern elements were settled in *Delalić* (*Čelebići*), below.

¹⁰³ See *Prosecutor v Delalić* (*Čelebići*), IT-96-21-T, Judgment (Trial Chamber, 16 November 1998) [330]–[400]; *Prosecutor v Bemba Gombo*, ICC-01/05-01/08, Judgment (Trial Chamber, 21 March 2016) [170]–[209] (the conviction was later reversed on other grounds by the Appeals Chamber on 8 June 2018, without disturbing the elements of the doctrine). The doctrine binds civilian superiors as well as military commanders, subject to the differentiated mental element in Article 28(b).

¹⁰⁴ The customary status of command responsibility, including in non-international armed conflict, was confirmed in *Prosecutor v Hadžihasanović*, IT-01-47-AR72, Decision on Jurisdiction (Appeals Chamber, 16 July 2003) [11]–[31].

¹⁰⁵ ICRC, *Customary IHL* (n 101), Rules 152–153.

¹⁰⁶ Rome Statute (n 52), art 33; cf Nuremberg Principles (n 19), Principle IV (superior orders no defence where a moral choice was in fact possible).

¹⁰⁷ See *Tadić* Jurisdiction Decision (n 26) [128]–[137].

¹⁰⁸ Convention against Torture (n 97), art 14. See also Lorna McGregor, 'Torture and State Immunity: Deflecting

Immunities case that, state immunity survived in civil proceedings even for grave violations, a conclusion the European Court of Human Rights has reached in parallel, and why the Italian Constitutional Court's refusal to give effect to that holding has remained so contested.¹⁰⁹ Beyond this asymmetry, the paper does not engage at length with civil immunity, which has generated its own literature after these decisions.¹¹⁰ The asymmetry is sometimes attacked as arbitrary, on the view that if the gravity of torture defeats immunity in a criminal court it should defeat it in a civil one. The displacement framework supplies the answer the gravity-based account cannot. 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 where the civil regimes do not. The framework thus furnishes a principled basis for treating the two contexts differently, which is what the practice does.

D. HYBRID TRIBUNALS AND PERSONAL IMMUNITY

The last problem is hybridity. The *Jordan* Appeal Judgment of 2019 declared, in reasoning that has drawn heavy criticism, that customary international law contains no immunity *ratione personae* for a head of state before an international criminal court.¹¹¹ Whatever its merits as an account of custom, the holding has now been applied by the Court's Pre-Trial Chamber in the Mongolia decision of October 2024, which found that Mongolia had breached its obligations by failing to arrest President Putin and reaffirmed that personal immunity, including that of heads of state, is not opposable before the Court.¹¹²

Impunity, Distorting Sovereignty' (2007) 18 *European Journal of International Law* 903, 917–19.

¹⁰⁹ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99 [91]–[97] (state immunity in civil proceedings unaffected by the gravity of the violation). See also *Sentenza* 238/2014 (n 9) [3.3]–[3.5]. The European Court of Human Rights reached parallel conclusions in *Al-Adsani v United Kingdom*, App no 35763/97 (ECtHR, 21 November 2001) [61], [66], and *Jones and Others v United Kingdom*, App Nos 34356/06 and 40528/06 (ECtHR, 14 January 2014) [195]–[215].

¹¹⁰ *Sentenza* No 238/2014 (Italian Constitutional Court, 22 October 2014) [3.1]–[3.5]; for the ensuing debate, see generally, 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 rested its refusal on the right of access to justice under articles 2 and 24 of the Italian Constitution, treated as a counter-limit to incorporation of the international rule.

¹¹¹ *Jordan* Appeal Judgment (n 81) [113]–[117]; for criticism, 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/>.

¹¹² *Prosecutor v Putin*, Decision on Mongolia's Non-Compliance (n 7) [27]–[35] (personal immunity not opposable before the Court; no waiver required). The Chamber treated the matter as settled by *Jordan*, finding non-cooperation without revisiting the underlying immunity analysis.

Whether the *Jordan* logic extends to a hybrid tribunal such as the Special Tribunal is the open question, and the displacement view supports the extension only with qualification. The displacement of personal immunity sets a higher threshold than that of functional immunity and is most defensible where the tribunal exercises an authority the contracting states could not have exercised individually, which is the point the *Jordan* Chamber had in mind in denying any analogy between two states and between a state and an international court.¹¹³ The criticism of the Bashir reasoning has force, for the Chamber asserted the inapplicability of personal immunity before international courts without identifying its customary source, and in a case where jurisdiction rested on a Security Council referral that could itself have supplied the answer.¹¹⁴ Applied to the Special Tribunal, this yields a conclusion more nuanced than either pole of the debate allows. The Tribunal undoubtedly displaces the functional immunity of those within its jurisdiction; its capacity to displace personal immunity is more doubtful, and the suspension worked by Article 23(5) is best read as a candid acknowledgement of that doubt rather than a failure of nerve.¹¹⁵ If and when the question is forced, by an incumbent's loss of office or otherwise, the case for trial will turn on whether the Tribunal can by then claim a properly international jurisdiction, a claim its drafters evidently hoped to strengthen through the accession of further states over time.

The picture that emerges, when the three problems are taken together, is of a framework more capacious than its 2010 formulation but identical in its doctrinal 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. The test for whether a tribunal may disapply personal immunity is whether it exercises a proper international jurisdiction, a test met unambiguously by the Court and more debatably by the Special Tribunal. Throughout, the logic is constant: a later jurisdictional rule contemplating the prosecution of officials displaces the earlier immunity that would otherwise frustrate it.¹¹⁶

¹¹³ *Jordan Appeal Judgment* (n 81) [114].

¹¹⁴ In the *Al-Bashir* situation the Court's jurisdiction rested on a referral effected by UNSC Res 1593 (31 March 2005), which could itself have supplied the basis for setting aside immunity. See Akande (n 111).

¹¹⁵ STCoA Agreement (n 7), arts 1, 23(5); Nuridzhanian (n 67) 16–18.

¹¹⁶ Akande and Shah (n 1) 839–40; cf the convergent reasoning in Bundesgerichtshof (n 5) [27]–[29].

V. CONCLUSION

The framework of jurisdictional displacement has been borne out rather than overtaken by the developments of the past 15 years. The German Federal Court of Justice, in two successive decisions, has endorsed its central insight that customary universal jurisdiction over war crimes presupposes the inapplicability of functional immunity, and has confirmed that the insight holds regardless of rank. The International Law Commission, though it has proceeded by a more inductive method, has produced in Draft Article 7 a codification best read as resting on displacement logic, as its own Drafting Committee came close to saying in 2025. The continuing controversy over *Sentenza* 238/2014 has exposed the weakness of the *jus cogens* hierarchy theory, and the post-*Pinochet* case law on torture has shown the artificiality of the non-official-act theory. Of the rival accounts, only displacement retains its explanatory power.

Yet, the framework was unfinished, and the three refinements proposed here answer to problems that recent practice has exposed. The aggression problem calls for a generalisation of the displacement logic, on which the relevant co-extensiveness holds between any specific jurisdictional rule and the immunity that would frustrate it, whether the rule is universal or particular to a single tribunal. The rank problem must be resolved against any residual functional immunity for senior officials, command responsibility and the superior-orders limitation leaving no room for rank-based differentiation in substantive responsibility for international crimes.¹¹⁷ Functional immunity survives in civil proceedings such as *Ziada* because no co-extensive civil jurisdictional rule displaces it, not because of rank.¹¹⁸ The hybridity problem is the most contested; the *Jordan* Appeal Judgment and the Mongolia decision confirm that the Court is not bound by personal immunity, on a customary analysis criticised even by those sympathetic to the rule, and the refinement proposed here would extend that analysis to any tribunal exercising a properly international jurisdiction.¹¹⁹

As a result, two implications follow for Draft Article 7. The inclusion of aggression in Draft Article 7 is to be welcomed, but its justification is the theoretical logic of the provision rather than any sudden accumulation of state practice.¹²⁰ To withhold the supreme international crime while listing the others would introduce a hierarchy among the gravest crimes that neither

¹¹⁷ Rome Statute (n 52), arts 28, 33; ICRC, *Customary IHL* (n 101) Rules 152–153.

¹¹⁸ *Ziada* (n 94).

¹¹⁹ See *Jordan* Appeal Judgment (n 81) [113]–[117].

¹²⁰ Grossman Guiloff, Second Report (n 35) paras 53–74; cf Lieber Institute West Point (n 45).

Nuremberg nor Rome supports.¹²¹ The Special Tribunal's suspension of personal immunity is a prudential expedient that its consolidating international character may in time render unnecessary. The corporate veil of the state, behind which its officials once sheltered, is being lifted one jurisdictional rule at a time.¹²²

¹²¹ See 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), <https://crimeofaggression.info/wp-content/uploads/Gipa-letter-to-ILC.pdf>.

¹²² STCoA Agreement (n 5), art 23(5); Quénivet (n 72).