Transcript

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We're a month into 2025 and already it's pretty clear that International Criminal law will face some significant headwinds this year, but it's also a year that portends some significant developments in terms of the crime of aggression, both in terms of mobilisation towards special tribunal for the crime of aggression in relation to Ukraine.

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But also not unrelatedly the assembly of States, parties of the International Criminal Court beginning to think about the prospect of harmonising the jurisdictional regime over the crime of aggression with the jurisdictional regime at the ICC over the other three court crimes under it.

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Jurisdiction.

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Within the special tribunal for the crime of aggression, part of that and the mobilisation towards it is pretty clear and has been clear from the very beginning that the most significant legal issue is the issue of immunity.

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This is both reinvigorating, reinvigorated long standing debates, but also prompted new ideas and theories about how to set aside immunities.

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And what I'd like to do today is not necessarily simply rehash those doctrinal debates, but think about them in relation to normative coherence, their coherence with the underlying purposes of the relationship between immunities and International Criminal law.

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Not because.

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Heating go ahead.

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I'm with this temperature that I'm coming from a colder climate. Not not because I think normative coherence is necessarily interpretively dispositive.

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But I think it is interpretably relevant and even if one were to contest that it is at least relevant to states in thinking about how they're going to position themselves in relation to these developments in what is surely a moment of customary international law significance, however, one looks at it.

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The predominance of the attention has been on immunities, Rassiono Personae, status immunities, which is perhaps inevitable. Aggression is a leadership crime, and those immunities are particularly protective of at least certain persons in leadership positions.

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But there are also issues relating to immunities, rationing, material, functional immunities and in fact if functional immunities are applicable in this context, they pose an even greater obstacle to the pursuit of accountability for the crime of aggression.

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And personal immunities or status immunities.

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So I want to discuss both kinds, functional immunities and status immunities, but I'm going to start with functional immunities in part because of the significance of that potential impediment. So immunities, rationing, material functional immunities, as I'm sure everybody in the room knows in here in the nature of the impugned act.

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It's because the impuned Act is an official act, or was an official act that the immunity attaches, and therefore it doesn't matter whether the state official that is charged with that particular act remains in official at the time of the juridical process. What matters is the nature of the act at the time that the Act occurred. The Impugned act at the time of the.

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Occurred and the rationale for this is that states have the right to act through their officials and to understand their actions through their officials as state acts and have those acts understood as state acts and states operate in a horizontal posture of visa V1 and SO1. State doesn't have the vertical authority to stand in judgement of another.

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And with that act characterises the State act. Other states are precluded from standing in judgement over the official who engaged in that act. That, at least, is theory.

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There is one relatively widely, but clearly not universally recognised exception to this, namely where the Act in question was an international crime.

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This, in a sense one can see as coherent with the nature of the act being the underpinning of the immunity, the nature of the act is also the underpinning of the exception. But why exactly? Well, sometimes it's claimed.

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An international crime just isn't an official act for the purposes of immunity.

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That the fact that it's an official at that it's an international crime means it can't be official.

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That has always struck me as a peculiar, and, frankly, not particularly compelling rationale in this context, because it clearly is an official act when we're thinking about it from the perspective of state responsibility, it would be absurd.

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If states could not be held responsible for the greatest violations of international law because the very fact of them being the greatest violations of international law precluded them being official acts, which would be the predicate basis for state responsibility?

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So those.

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Say international crimes aren't aren't official acts.

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For the purposes of.

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See, but that also doesn't make that much sense, because the reason that the official status of the act is relevant for the purpose of the immunity is because it implicates state responsibility. So I think the more honest and persuasive answer to this is there's a tension here and the exception is trying to reconcile that tension.

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And the tension is between the collective imperative and impunity for international crimes and states authority to invoke their sovereign right not to have their officials judged in other states.

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And that this is an exception that seeks to balance those two competing imperatives. And in a sense, there's already a recognition that the state's sovereign prerogatives in this space are diminished, notwithstanding the official nature of the Act, because international law not only permits.

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But requires the officials in question to reject the state's authority to require them to perform those acts as part of its exercise of sovereign authority. And so this exception within the domain of.

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Is another way in which international law is adjusting what the state can do in this context, notwithstanding the fact that the underlying act is clearly an official act. Certainly when we're thinking about it from the perspective state responsibility, and therefore naturally when we're thinking about it from the perspective of.

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Of immunities. Of course, even this exception is contested and it's notable then in its draught articles on the immunity of state officials from foreign criminal jurisdiction. The International Law Commission passed draught Article 7. These articles obviously still under consideration.

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By a vote not by consensus, and exceptionally so in revealing the contents of that vote.

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Sit by a vote and I think it's correct that there is an exception here and the question then is if there's an international crime exception, doesn't it apply to the crime of aggression while not according to the International Law Commission? Because in draught Article 7,

it's specifically accepted the crime of aggression from the exception. So the exception covers.

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All core international crimes, genocide, war crimes, crimes against humanity, but not the crime of aggression.

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So the question is, well, why not the crime of aggression and the International Law Commission gave 2 answers to that question. One, the crime of aggression necessarily involves adjudicating a state act and state responsibility for that act. And two, it's uniquely politically sensitive and has unique political.

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It's because it's a leadership.

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So let's consider those in turn, because I think neither of them is ultimately compelling.

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It is of course true that aggression does entail a state act as an element of the crime, in other words, to determine that, for example, Vladimir Putin were guilty of the crime of aggression, one would have to determine that Russia violated the prohibition on the use of force.

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In invading Ukraine, that's a necessary component of reaching the conclusion in the criminal case. But I think it's not true that that renders aggression nearly as unique as is suggested by the International Law Commission or those who endorse endorse this exceptionality.

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First of all, traditional war crimes and indeed all grave breaches are themselves derivative of international humanitarian law, obligations that are owed by one state to another in a context of an international armed conflict, and in fact, the great breaches of Geneva Conventions reinforced specifically.

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Attach to violations of persons who are protected, persons whose protected persons status.

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Is derivative of their connection to the adversary state, whether by nationality under G of prevention for or by belonging to the armed forces or associated groups under G The Convention 3. Moreover, to determine a specific war crime.

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Can require first of all, determining the nature of the conflict, whether it's a belligerent occupation, for example, which requires making determinations of state sovereignty regarding territory or.

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Determining whether the armed group in question is engaging in acts that are attributable to an outside state in order to determine that it's an international armed conflict or reaching a determination with respect to the belligerent Nexus that is itself derivative of whether the individuals in question were acting in their official capacity, at least pursuant to jurisprudence of the International Criminal Tribunal for the.

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Yeah.

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But more fundamentally than that, some war crimes actually require reaching a determination on state action that cannot be understood as anything other than a violation of international humanitarian law. Given that the war crime in question is derivative of the underlying.

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International humanitarian law violation, concretely in article 82B8 of the International Criminal Court statute and article, also Article 85 or a of additional Protocol 1.

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It is a war crime to engage in the transfer of occupying power populations into occupied territory, but in both articulations additional protocol one and the ICC Statute that requires making a determination that those persons were transferred by the occupying power.

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That's an element of the crime that the International Criminal Court 1 cannot reach that determination of criminal guilt in that case, without determining first that the occupying power transferred this population into occupied territory.

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And the only implication that is available from that is it did so in violation of international humanitarian law because the criminal responsibility of the individual accused is on the basis of a war crime that is derivative of an underlying rule of international humanitarian law that is implicated by precisely the finding that the occupying power transferred the population into the occupied territory.

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And this is obviously not limited to war crimes. We look at crimes against humanity, whether we're looking at the articulation in Article 7 of the ICC Statute and especially 72A or in the articulation in the draught crimes against Humanity Treaty in Article 2, and specifically Article 22.

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A crime against humanity at the chapeau level requires a widespread or systematic attack, and that attack is defined in both the ICC Statute and the draught crimes against Humanity Treaty, as pursuant to a state organisational policy.

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And in many cases, therefore, that's going to require determining that there was a state policy to engage in a widespread or systematic attack against civilian population, and if it's pursuant to jurisdiction under the crimes against Humanity Treaty, assuming that gets agreed.

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By the.

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Of the crimes against Humanity Treaty in article three, that is a state violation of that specific.

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So there's no way of reaching a determination of a crime against humanity of that nature without reaching the determination that a state has engaged in a policy that is in clear violation of its obligations under international law. And these aren't theoretical.

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Examples. Right now we have arrest warrants that the International Criminal Court for both Russian and Israeli officials for crimes against humanity that are predicated on a state policy of a crime, of a systematic or widespread attack on civilian populations in Ukraine.

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And Gaza.

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To conclude those cases, one would have to reach a determination that there is a state policy in violation of international law, and it can even extend to other international crimes that I haven't mentioned, including genocide. If the mode of liability.

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Charged entails an implication of state responsibility, so concretely, the arrest warrant for Omar Al Bashir at the International Criminal Court is predicated on mode of liability in 25 three of the ICC statute acting through another and specifically acting through the state apparatus of Sudan.

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So again, you could not determine guilt of the accused in that case without determining a state violation.

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Of course, one might say OK, but it's slightly different because in the crime of aggression case and here, drawing on the indispensable third party doctrine at the ICJ, which is not necessarily applicable before the ICC, but drawing on that doctrine might say, well, The thing is in the aggression case, the court actually has to say the words.

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Has to say Russia violated the law prohibiting the use of force in order to reach the aggression determination and it doesn't have to say exactly that in the other cases.

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But what normatively turns on the distinction between that and determining that there was a state policy to engage in a widespread or systematic attack against civilian population without then saying, and that violates that state's obligations under international law?

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There's no alternative implication. There's no alternative inference other than precisely that. So is there really a sufficiently normatively powerful distinction between those?

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Two to then draw the distinction between crimes against humanity and aggression or war crimes and aggression. For the purposes of this kind of immunity, we might say,

well, it's not just the formal distinction of the words. There's something deeper in the distinction between the two, because in the state action.

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In a war crimes case or in a crime against humanity, case, the state action component of that is normatively tangential, whereas in the aggression case it's at the crux of the whole thing. That's the centre piece of what aggression is. It's a state violation against another state.

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But that's both, I think overly dismissive of the state action components of the war crimes and crimes against humanity cases in these scenarios, but also in much more fundamentally, overly dismissive of the human atrocity that is that the crux of the.

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Of aggression.

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I've argued this in other places, including in this very room, about a decade ago.

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The wrongfulness of aggression in his in the fact that it entails killing inflictions of human suffering and destruction without legal justification, and that without the crime of aggression we would have no criminal articulation of the wrongfulness of those acts.

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At least in so far as many of them are compliant with international humanitarian law.

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So for all of those reasons, this distinction between the two or between aggression and the others is simply not compelling.

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What about then this idea that it's uniquely politically significant, because it entails leadership responsibility?

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What is contrary to history? To think that other international crimes don't also do that, because every single.

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Criminal proceeding against every single member of a leadership position of any state by any other court has involved crimes other than aggression. Some of them have also involved aggression, but there hasn't been a single.

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That hasn't involved the other international crimes. So all international crimes have political implications, and all of them can have political implications at the top. It's true that aggression is the only one that can only have them at the top.

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But since the other ones can also have them at the top, why would they not also raise this same kind of concern? And in fact, obviously they do, and we have a tool for that which is personal immunities, status, immunities, those are the kinds of immunities that we use to respond to the unique concerns that attach to the fact that this implicates.

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Political leaders and there's no distinction across crimes in that context. So this ultimately I think is also not a coherent defence of aggressions. Uniqueness in this context. So for all of those reasons, if there's an international crime exception.

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Functional immunities. There's no good argument for why it shouldn't also apply to the crime of aggression. One could make an argument for why there shouldn't be an international crime exception at all. Obviously some states are doing that with respect to draught Article 7. I think they're wrong.

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But it's at least a coherent position, but it's not coherent to say that aggression is distinctive in this respect.

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And just on a very brief doctrinal point, there's also a question of how one categorises the customary international law burdens here because the International Law Commission is claiming that these crimes are all covered by the exception, there's not state practise in opinion or EUR with respect to each of those crimes. There's state practise in opinion, EUR that one can argue in tears and international crime exceptions.

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That would naturally attach to aggression, and then one would have to show state practise in opinion Eurus that there's an exception to the exception that exempts aggression from the exception, whereas other crimes are included.

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So let me shift then to status immunities. The fact that not that functional immunities are not implicated would itself be significant even if we don't get over the hurdles relating to state to status immunities because possible the leadership element of the crime of aggression is not exhausted by, it's not coterminous with.

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The category of persons who are protected by status Immunities, the troika head of state, head of government, foreign minister, protected by status Immunities, the leadership element of the crime of aggression, can clearly extend beyond those 3.

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But secondly, since status immunities lapse at the termination of the individuals holding of that status.

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The non applicability of functional immunities is crucial to the viability of prosecuting people after they've ceased to hold the status in question. So with status immunities I've already just implied this, but the immunity attaches in virtue of the status of the person at the time of the juridical act and has nothing to do with the status of the person.

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Or the nature of the impugned act.

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So.

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It's just about the states of the person that the juridical act.

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And what's the justification for that? Well, clearly, it's not going to be about the nature of the act, because the nature of the act has nothing to do with whether the immunity applies. So it's a completely different kind of justification. Sometimes the argument that's invoked here in justification of status immunities is that the head of state is somehow.

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The personification of the state, the manifestation of the state in human form, and so to act against that person would be to act against the state, would essentially bring the state into court.

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And that can't be done because of the sovereign equality of States and so on.

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That strikes me as a remarkably antiquated notion of the relationship between States and their leaders. But even if one thought that it was somehow still appropriate in the contemporary context to reason in those terms, I don't think it can plausibly be extended to head of government or foreign Ministers. So it doesn't really explain status immunities at all.

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A much more coherent and I think more powerful explanation is the explanation the ICJ offered in 2002 in the DRC versus Belgium case. The Erodia case in which it said.

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These specific kinds of individuals, the individuals holding these specific kinds of roles.

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Perform a critical function in the relationship between their state and the international system, and that critical function necessitates them engaging in foreign affairs in a particular kind of way, including through global travel and engagement.

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And what that means is that while they hold that status, the risk of being subject to any kind of legal action.

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Unilaterally by any other state in the system would fundamentally undermine their capacity to perform that function and would therefore actually have systemic effects on the entire framework of international relations, because all states would constantly be at risk of this.

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And in particular, at risk of its instrumentalization on partisan basis in ways that would undermine their capacity to engage in international affairs.

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So, because that's the rationale, which has nothing to do with the nature of the act with which they might be charged, it's at least coherent to think there wouldn't international crime exception here. One can make arguments for why there could be a balance of different interests, but the clear weight of opinion.

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Not withstanding at all, rather precisely because of the IC J's decision in the uradia cases that there is no international crime exception to these kinds of immunities.

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So then of course, the question is, well, is there any other kind of exception? And the dominant answer to that in terms of where there could be an exception notwithstanding objections to this most prominently from people in the room is that there is an international court exception to this.

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That the exception is an institutional exception rather than a nature of the crime exception, and that is at least responsive to the notion that the concern to which these kinds of immunities are responsive.

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There's a concern about the relationship.

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Ship between the institution that's engaging in the drudge collect and the functioning of the state, whose head of state head of government or foreign minister are implicated in that particular juridical act?

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The question.

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Well, why exactly would the fact that it's an international court changed the?

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And one of the things that Dappo's emphasised in this respect is.

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It can't be the case. That's simply a cluster of states acting together can do what a state acting individually can't do in this respect, and clearly that's correct. Also from the

perspective of understanding the functioning of this particular immunity, because you could just have states banding together to create precisely the kind of partisan instrumentalization.

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See that the immunity is seeking to safeguard against.

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So then what exactly is different about an international court? Well, if an international court is to have an authority that's different here, it has to be not on the basis that it's created by a treaty, not on the basis that it involves more than one state, because both of those are vulnerable to precisely the kind of critique that that was.

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Issue.

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But rather that this particular institution can credibly claim to speak from the perspective of the international community, imbued institutionally with concern for the functioning of the international system.

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And not vulnerable to the kind of instrumentalisation and infusion of partisan interests that the status immunity is seeking to safeguard against.

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Concretely, when we're thinking especially about an ad hoc tribunal that occurs or is created after the event, and obviously therefore doesn't involve.

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The state that is the affected state, it would have to be the case that that tribunal is created not by an ad hoc coalition of actors.

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Who would, by their very nature simply be responsive to the partisan interests in this particular context, but instead by an international organisation that pre existed the wrongful act and that either includes as a member of the affected state or at least included as a member of the affected states at the time of the wrongful.

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Or is sufficiently broad in its membership diversion, its membership and open to that state's membership to credibly claim to be acting from the Community's perspective?

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As a whole, as opposed to from a specific partisan perspective. Concretely, in this particular context, that would mean clearly a special tribunal created on the authority of a pre-existing international organisation like NATO or the EU, would be ruled out. Those are closed, narrow and partisan in their.

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One that's created with the blessing of the General Assembly, I think, would the United Nations General Assembly would clearly be ruled in, and the Council of Europe would potentially be ruled in exclusively on the basis that.

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Russia was a member.

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Of the initial wrongful act. And so there's at least a credible claim that this is a Community Action on behalf of the Community of which Russia was a member, although I think it's not as straightforward with the Council of Europe as obviously with the General Assembly.

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But one thing that would absolutely be off the table is a coalition of the willing. No matter how many states it involves and no matter how much will might characterise the tribunal as international insofar as it's created by treaty and not rooted in a domestic court.

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Because that would not be institutionally resilient against precisely the kind of concerns that status immunities are designed to safeguard against.

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And in all of this, the question of hybridity and whether it has a connection with domestic jurisdiction is just irrelevant. It can have a connection with Ukraine's domestic jurisdiction if it has the necessary endorsement and blessing of an organisation that has the kind of features.

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That I just mentioned.

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And of course, the mobilisation towards the special tribunal might not actually succeed in meeting these criteria, even the Council of Europe version.

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And even if it does succeed in meeting those criteria, the international courts exception is, as I've mentioned, controversial. And so necessarily, there has also been an examination of other possible exceptions to status immunities as they apply to this particular context.

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And I want to just touch on two different kinds of exception and discuss those before concluding. Although in my view one of them is not viable and the other, although legally viable, is probably not ultimately desirable.

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The first kind of exception would be to invoke circumstances precluding wrongfulness, say look, you can engage in what would ordinarily be an unlawful act if it is justified by a circumstance precluding wrongfulness in this case, either self defence.

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Or countermeasures under oaths 21 and 22 of the draught articles on state responsibility.

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And the argument with respect to self defence, which dappo made very early on in this development is a state can use force in response to an aggression by another state. It can kill and it can even kill the commander in chief if that individual qualifies as combatant.

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Or, plausibly, a civilly and directly participating in hostilities at the time of the lethal use of force. And if it can kill the commander in chief because there's a circumstance precluding wrongfulness, well, how could it not arrest and prosecute that individual?

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And the countermeasures argument works pretty similarly, except for the fact that countermeasures can't involve the lethal use of force, so it's operating on a slightly

different dimension not using that particular parallel. But saying look, this is a response to an unlawful act by Russia.

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And it's a proportionate response because the infringement of Russia's ability to engage in its international relations and its sovereign rights in that respect is far less than the infringement Russia is inflicting on Ukraine's ability to engage in international relations successfully. And it's sovereign rights. By engaging in the aggression in the first place.

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The problem with these arguments is not proportionality. The problem is the nature of the relationship between circumstances precluding wrongfulness and especially self defence and countermeasures and criminal justice. And there are three dimensions on which that relationship cannot sustain this argument.

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Temporal exigency and impartiality.

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Temporally, these particular circumstances precluding wrongfulness are fundamentally forward-looking. Of course, there has to be a breach, but neither of them is about responding to the pass breach. They are about ending the breach.

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And it has to therefore be ongoing and as soon as it's ended, they are supposed to stop, whereas criminal.

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Even if one takes a view that it performs a deterrent function is in the criminal case, fundamentally, backward looking is looking at whether there was a breach and who was responsible for that breach and is not supposed to be directed at all.

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To addressing a particular situation that's ongoing, it may be that the crime for which this individual is guilty is ongoing, but that's got nothing to do with their criminal responsibility. If they're in the dock at the moment of being tried, their criminal responsibility attaches to those things that happened in the park.

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But the exigency problem is actually bigger because the nature of these things is that they're about an exigent response to a particular.

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Impending catastrophe or problem that needs to be addressed through what would otherwise be an unlawful act. But criminal justice is specifically not about responding exigently to a particular ongoing wrongful act, but instead about responding deliberately and under the imperatives of justice.

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And this actually gets to be even deeper problem, which is impartiality, because the nature of this exception to the immunity would require the court to determine not just that the alleged acts.

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Is a crime within its jurisdiction the kind of determination that has to be made for the exception to functional immunities?

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But that that act.

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Is occurring and that this court is the instrument of resistance to that act.

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The very act over which it is supposed to exercise impartial adjudicative authority, it has to understand itself to be the instrument of resistance against the defined as occurring.

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Acts over which it's then exercising judicial authority, and that ultimately is so fundamentally contrary to the very nature of what courts do.

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And the source of their authority that it simply cannot be.

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The basis for an exception to this kind of immunity, the final exception that I just want to touch on, which I think.

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More.

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Viable, but probably ultimately not desirable as a path to.

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Is an exception that would be rooted in international humanitarian law, as Alex Specialis in this context might think, well, hang on a SEC, this is going to get into major issues of the conflation of Yousef Bellam and Yusen Bello.

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The basis for this exception would be. It's clear that during an armed conflict, parties to the conflict can detain combatants on the other side and detain them until the end of actor hostilities. And for precisely the same reason that they could target the commander in chief, they could also detain the commander in chief and detain that.

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I'm a prisoner for convention.

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What this does is create a distinct space in a context of armed conflict in which all of the functional value of the status immunity is fundamentally eroded because the individual in question, the head of state, can be detained in a way that completely impairs their ability to engage in international relations.

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Or the duration of hostilities.

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An international humanitarian law then has a specialised regime of immunities regarding persons. In this context that they cannot be prosecuted for ordinary acts of war, and they are to be returned at the end of active.

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In that context.

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But the one exception to that is they can be prosecuted for international crimes.

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And pursuant to Geneva Convention three, they don't have to be returned if a criminal proceeding relating to international crimes is ongoing at the time, at the end of active hostilities, and can in fact be held and ultimately convicted, and then sentenced and held as incarcerated persons.

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After the end of active hostilities on the basis of that particular exception.

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This doesn't.

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The separation between Usad bellam and Usim Bello because it doesn't entail anything about the outcome of that particular proceeding. It just entails that persons detained under the prisoner of war convention can be prosecuted for international crimes.

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And don't have any immunity specialised, recognising a specialised regime of immunity under international humanitarian law from that prosecution.

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But I think it would ultimately be undesirable to pursue this line of reasoning primarily because it runs contrary to the rationale for status immunities, which is that they are supposed to be protected against the partisan enforcement of international law.

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By one state or another, and so, even though I think one could make an argument for this through this idea that international humanitarian law has its own rules regarding what you can do.

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Heads of state, including detaining them in ways that would otherwise be fundamentally contrary to the rationale for state's immunities and including once detained prosecuting any person under the prisoner who's detained under prison of War Convention for International Crimes.

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I think the implications of pursuing this, especially for aggression, but probably not uniquely for aggression, would ultimately make it an undesirable.

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Development. So The upshot of this is that when we're thinking about status immunities, I think there is a credible basis for saying there's an international court exception, but it has to be rooted in the kind of institutional considerations that I mentioned rather than some formal notion of what's international and what's domestic.

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The circumstances precluding wrongfulness arguments can't work ultimately, primarily because of their implications for impartiality. And although there is potentially Alice's argument rooted in international humanitarian law, it would ultimately be undesirable to develop international law in that direction and to rely on that in these kinds of circumstances.