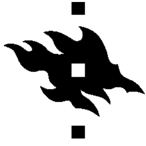

Head of State Immunity from Foreign Criminal Jurisdiction and a Human Rights Exception – Legacy of the Pinochet Case

Katariina Kinnunen

Master Thesis

Faculty of Law, University of Helsinki

Research Seminar of International Law

Supervised by Jan Klabbers

November 2019

HELSINGIN YLIOPISTO
HELSINGFORS UNIVERSITET
UNIVERSITY OF HELSINKI

Tiedekunta – Fakultet – Faculty Faculty of Law			Koulutusohjelma – Utbildingsprogram – Degree Programme
Tekijä – Författare – Author Katariina Kinnunen			
Työn nimi – Arbetets titel – Title Head of State Immunity from Foreign Criminal Jurisdiction and a Human Rights Exception – Legacy of the Pinochet case			
Oppiaine/Opintosuunta – Läroämne/Studieinriktning – Subject/Study track Public International Law			
Työn laji – Arbetets art – Level Master Thesis	Aika – Datum – Month and year November 2019	Sivumäärä – Sidoantal – Number of pages XV+80	

Tiivistelmä – Referat – Abstract

The thesis is focused on two battling concepts: head of state immunity from criminal proceedings in foreign national courts and accountability of heads of state for international crimes and human rights violations they have committed. These concepts are studied in the light of the developments after a remarkable judgment by the United Kingdom's House of Lords regarding Chile's former president Augusto Pinochet, who according to the judgment did not enjoy immunity of a former head of state for crimes of torture. This year, 20 years have passed since this revolutionary judgment was given on March 24, 1999.

Head of state immunity can be derived from state immunity, although currently it must be considered as a distinguished concept from the rules of state immunity. It has also similarities to diplomatic immunity. However, currently there is no separate convention regarding only head of state immunity. The International Law Commission (ILC) has been drafting articles on immunity of state officials from foreign criminal jurisdiction since 2006, but the work is not yet finished. This can be counted as an important expression of opinion in the area of head of state immunity. Thus, currently customary international law plays the most central role when trying to reconcile head of state immunity and current requirements of international criminal and human rights law.

A possible human rights exception could include international crimes and other serious human rights violations. International crimes include core international crimes and additionally few other crimes. Serious human rights violations include breaches of human rights that cannot be derogated. These criminal actions are often subject to universal jurisdiction, which means that they should be punished wherever committed, and more importantly, by whoever. Thus, also the most high-ranking officials, such as heads of state should be held individually responsible.

Since head of state immunity is divided to immunity *ratione personae* (reserved for incumbent heads of state) and immunity *ratione materiae* (covering official acts of former heads of state), which are distinctively different from each other, a possible human rights exception must be established separately to these doctrines. The elements of established rules of customary international law, state practise and *opinio juris*, show that a certain kind of human rights exception exists to immunity *ratione materiae*, whereas immunity *ratione personae* remains inviolable. The national and international cases and national legislations alongside other state practise and *opinio juris*, such as the ILC's work and multilateral treaties however demonstrate, that the scope of the exception is not general, but including mainly just international crimes and excluding other serious human rights violations. Rationale for immunity, proper functioning of states, does not require that former heads of state should not be held responsible in foreign courts.

Avainsanat – Nyckelord – Keywords

Head of state immunity, human rights exception, international crimes, *ratione materiae*, *ratione personae*, universal jurisdiction, customary international law, state practise, *opinio juris*

Ohjaaja tai ohjaajat – Handledare – Supervisor or supervisors

Jan Klabbers

Säilytyspaikka – Förvaringställe – Where deposited

Faculty of Law, University of Helsinki

Muita tietoja – Övriga uppgifter – Additional information

Table of Contents

Abbreviations III

Bibliography IV

1. Introduction 1

   1.1 Research question and method 1

      1.1.1 The Doctrinal Method 2

   1.2 Scope 5

   1.3 Structure 5

   1.4 Terminology 6

   1.5 Regulation: customary international law 8

2. Introducing immunity 9

   2.1 Jurisdiction 9

      2.1.1 Universal jurisdiction principle 10

   2.2 Rationale of Immunity 12

   2.3 State immunity 13

      2.3.1 Absolute doctrine 14

      2.3.2 Restrictive doctrine 15

      2.3.3 Relationship between state immunity and head of state immunity 16

   2.4 Diplomatic immunity 18

   2.5 Head of State immunity 19

      2.5.1 Ratione personae 20

      2.5.2 Ratione materiae 21

      2.5.2.1 Official acts v. private acts 23

3. Defining international crimes and human rights violations 24

   3.1 Core international crimes 24

      3.1.1 Genocide 25

      3.1.2 Crimes against humanity 27

      3.1.3 War crimes 29

      3.1.4 Crime of aggression 31

   3.2 Other international crimes and serious human rights violations 34

      3.2.1 Torture 35

3.2.2 Enforced disappearances 36

3.2.3 Crime of apartheid 38

3.2.4 Other serious human rights violations 40

4. Reconciling head of state immunity with international crimes and other serious human rights violations: Human rights exception 41

4.1 Human rights exception theories 41

4.2 Exception based on customary international law: state practise and *opinio juris* 42

4.2.1 Court Cases 44

4.2.1.1 Cases supporting a human rights exception 48

4.2.1.2 Cases not supporting a human rights exception 55

4.2.1.3 Cases not clearly stating on a human rights exception in criminal proceedings 59

4.2.2 National legislations 65

4.2.3 Other evidence of state practise and *opinio juris* 67

5. Conclusion 71

5.1 Human rights exception: *ratione personae* 71

5.2 Human rights exception: *ratione materiae* 74

5.2.1 Scope of the exception 80

Abbreviations

Apartheid Convention	International Convention on the Suppression and Punishment of the Crime of Apartheid 1973
EAC	Extraordinary African Chambers
ECHR	European Court of Human Rights
Enforced Disappearance Convention	International Convention for the Protection of All Persons from Enforced Disappearance 2007
European Immunity Convention	European Convention on State Immunity 1972
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide 1948
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
ILC	International Law Commission
Torture Convention	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
UN	United Nations
UN Immunities Convention	United Nations Convention on Jurisdictional Immunities of States and Their Property 2004
VCCR	Vienna Convention on Consular Relations 1963
VCDR	Vienna Convention on Diplomatic Relations 1961

Bibliography

Treaties

Charter of the International Military Tribunal (1945). (Cited as: Nuremberg Charter 1945)

Control Council Law no. 10 (1945)

United Nations Charter (1945)

Charter of the International Military Tribunal for the Far East (1946). (Cited as: Tokyo Charter 1946)

Convention on the Prevention and Punishment of the Crime of Genocide (1948). (Cited as: Genocide Convention 1948)

First Geneva Convention (1949)

Second Geneva Convention (1949)

Third Geneva Convention (1949)

Fourth Geneva Convention (1949)

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

Vienna Convention on Diplomatic Relations (1961)

International Covenant on Civil and Political Rights (1966)

American Convention on Human Rights (1969)

Convention on Special Missions (1969)

Vienna Convention on the Law of Treaties (1969)

European Convention on State Immunity (1972)

International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)

Protocol I additional to the Geneva Conventions (1977)

Protocol II additional to the Geneva Conventions (1977)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). (Cited as: Torture Convention 1984)

Rome Statute of International Criminal Court (1998)

United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). (Cited as: UN Immunities Convention 2004)

International Convention for the Protection of All Persons from Enforced Disappearance (2007)

National Legislations

United States' Foreign Sovereign Immunities Act (1976)

United Kingdom's State Immunity Act (1978)

Canada's State Immunity Act (1982)

Australia's Foreign Sovereign Immunities Act (1985)

Loi relative à la répression des violations graves de droit international humanitaire, Belgium (1999)

International Cases

Trial of the Major War Criminals before the International Military Tribunal vol 17, Nuremberg, 14 November 1945 - 1 October 1946, [1948] International Military Tribunal. (Cited as: Trial of the Major War Criminals before the International Military Tribunal vol 17, 1948)

Corfu Channel (United Kingdom v. Albania), Merits, [1949] ICJ Reports 1949 (Cited as: Corfu Channel 1949)

North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Merits, [1969] ICJ Reports 1969 (Cited as: North Sea Continental Shelf 1969)

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, [1986] ICJ Reports 1986. (Cited as: Military and Paramilitary Activities in and against Nicaragua 1986)

Prosecutor v. Dusko Tadic, Jurisdiction, [1995] International Criminal Tribunal for the former Yugoslavia, IT-94-1 (Cited as: Prosecutor v. Tadic 1995)

Prosecutor v. Anto Furundija, Trial Judgment, [1998] International Criminal Tribunal for the former Yugoslavia, IT-95-17 (Cited as: Prosecutor v. Furundija 1998)

Prosecutor v. Ntuyahaga, Decision on the Prosecutor's Motion to Withdraw the Indictment, [1999] International Criminal Tribunal for Rwanda, ICTR-98-40-T (Cited as: Prosecutor v. Ntuyahaga 1999)

Al-Adsani v. the United Kingdom, Merits, [2001] European Court of Human Rights, Application no. 35763/97 (Cited as: Al-Adsani v. the United Kingdom 2001)

McElhinney v. Ireland, Merits, [2001] European Court of Human Rights, Application no. 31253/96 (Cited as: McElhinney v. Ireland 2001)

Prosecutor v. Milosevic, Decision on Preliminary Motions, [2001] International Criminal Tribunal for the former Yugoslavia, IT-02-54 (Cited as: Prosecutor v. Milosevic 2001)

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Merits, [2002] ICJ Reports 2002. (Cited as: Arrest Warrant case 2002)

Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, [2006] ICJ Reports 2006 (Cited as: Armed Activities on the Territory of the Congo 2006)

Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Merits, [2012] ICJ Reports 2012 (Cited as: Jurisdictional Immunities of the State 2012)

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, [2015] ICJ Reports 2015 (Cited as: Application of the Convention on the Prevention and Punishment of the Crime of Genocide 2015)

National Cases

The Schooner Exchange v. M´Faddon, [1812] U.S. Supreme Court, the United States, 11 U.S. 116. (Cited as: The Schooner Exchange v. M´Faddon 1812)

Attorney-General of Israel v. Eichmann, [1962] Supreme Court of Israel, Israel, Criminal Appeal 336/61 (Cited as: Israel v. Eichmann 1962)

Verlinden B.V. v. Central Bank of Nigeria, [1983] U.S. Supreme Court, the United States, 461 U.S. 480. (Cited as: Verlinden B.V. v. Central Bank of Nigeria 1983)

Demjanjuk v. Petrovsky, [1985] U.S. District Court, Northern District of Ohio, the United States, 612 F. Supp. 571 (Cited as: Demjanjuk v. Petrovsky 1985)

MacArthur Area Citizens v. Republic of Peru, [1987] U.S. Court of Appeals, District of Columbia Circuit, the United States, 809 F.2d 918 (Cited as: MacArthur Area Citizens v. Republic of Peru 1987)

Fickling v. Australia, [1991] U.S. District Court for the Eastern District of New York, the United States, 775 F. Supp. 66 (Cited as: Fickling v. Australia 1991)

Siderman de Blake et al. v. The Republic of Argentina, [1992] U.S. Court of Appeals, Ninth Circuit, the United States, 965 F.2d 699 (Cited as: Siderman v. Argentina 1992)

Schmidt v. Home Secretary of the Government of the United Kingdom, [1994] High Court, Ireland, 103 ILR 322 (Cited as: Schmidt v. Home Secretary of the Government of the United Kingdom 1994)

Propend Finance Pty Ltd v. Sing, [1997] Court of Appeal, the United Kingdom, 111 ILR 611 (Cited as: Propend Finance Pty Ltd v. Sing 1997)

Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), [1999] the House of Lords, the United Kingdom, UKHL 17. (Cited as: Pinochet III 1999)

Distomo Massacre case (Prefecture of Voiotia v. Federal Republic of Germany), [2000] Greece Court of Cassation, Greece, Case No 11/2000. (Cited as: Distomo Massacre case 2000)

Holland v. Lampen-Wolfe, [2000] the House of Lords, the United Kingdom, UKHL 40 (Cited as: Holland v. Lampen-Wolfe 2000)

Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia, [2000] U.S. Court of Appeals, Second Circuit, the United States, 218 F.3d 152 (Cited as: Third Avenue Associates v. Yugoslavia 2000)

H.S.A. et al. V. S.A. et al., [2003] Court of Cassation of Belgium, Belgium, No. P.02.1139.F. (Cited as: H.S.A. et al. V. S.A. et al. 2003)

Bouzari et al. v. Islamic Republic of Iran, [2004] Court of Appeal for Ontario, Canada, Docket No. C38295. (Cited as: Bouzari et al. v. Islamic Republic of Iran 2004)

Ferrini v. Federal Republic of Germany (en), [2004] Court de Cassation, Italy, no 5044/4 (unofficial English translation), https://documents.law.yale.edu/sites/default/files/ferrini_v._germany_-_italy_-_2004.pdf . (Cited as: Ferrini v. Federal Republic of Germany (en) 2004)

Enahoro v. Abubakar, [2005] U.S. Court of Appeals, Seventh Circuit, the United States, 408 F.3d 877 (Cited as: Enahoro v. Abubakar 2005)

Fang v. Jiang, [2006] The High Court of New Zealand, Auckland Registry, New Zealand, CIV 2004-404-5843. (Cited as: Fang v. Jiang 2006)

Gutch v. Federal Republic of Germany, [2006] U.S. District Court, District of Columbia, the United States, 444 F. Supp. 2d 1 (Cited as: Gutch v. Federal Republic of Germany 2006)

Jones v. Kingdom of Saudi Arabia, [2006] the House of Lords, the United Kingdom, UKHL 26. (Cited as: Jones v. Kingdom of Saudi Arabia 2006)

Regina v. Jones et al., [2006] the House of Lords, the United Kingdom, UKHL 16. (Cited as: R. v. Jones et al. 2006)

Compare Sarei v. Rio Tinto, [2007] U.S. Court of Appeals, Ninth Circuit, the United States, 487 F.3d 1193 (Cited as: Compare Sarei v. Rio Tinto 2007)

Case of Donald Rumsfeld (France v. Donald Rumsfeld), [2008] Letter of the Public Prosecutor (Procureur Général) to the Paris Court of Appeal, France, 2007/09216/SGE. (Cited as: Case of Donald Rumsfeld 2008)

The Khaled Nezzar Case (en), [2012] Swiss Federal Criminal Court, Switzerland, File no. BB.2011.140 (unofficial English translation by TRIAL). (Cited as: The Khaled Nezzar Case (en) 2012)

Yousuf v. Samantar, [2012] United States Court of Appeals, the United States, No. 11-1479. (Cited as: Yousuf v. Samantar 2012)

Ministère Public v. Hissein Habré, [2016] Extraordinary African Chambers, Senegal. (Cited as: Ministère Public v. Hissein Habré 2016)

Omar Al Bashir Case (The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre), Judgment, [2016] The Supreme Court of Appeal of South Africa, South Africa, 867/15 ZASCA 17. (Cited as: Omar Al Bashir 2016)

Books

Alebeek, Rosanne Van, '*The Immunity of States and their Officials in International Criminal Law and International Human Rights Law',* Oxford University Press, 2008. (Cited as: Alebeek 2008).

Barriga, Stefan, '*Negotiating the Amendments on the Crime of Aggression*', in Barriga, Stefan & Kress, Claus (ed.), '*The Travaux Préparatoires of the Crime of Aggression',* Cambridge University Press, 2012, 3 - 57. (Cited as: Barriga 2012)

Bassiouni, M. Cherif, '*Introduction to International Criminal Law',* Leiden: Martinus Nijhoff Publishers, 2013. (Cited as: Bassiouni 2013)

Brownlie, Ian, '*Principles of Public International Law',* Oxford University Press, 2008. (Cited as: Brownlie 2008)

Bröhmer, Jürgen, '*State Immunity and the Violation of Human Rights',* The Hague: Martinus Nijhoff Publishers, 1997. (Cited as: Bröhmer 1997)

Cassese, Antonio, '*Cassese's International Criminal Law',* Oxford University Press, 2013. (Cited as: Cassese 2013)

Costelloe, Daniel, '*Legal Consequences of Peremptory Norms in International Law*', Cambridge University Press, 2017. (Cited as: Costelloe 2017)

Crawford, James, '*The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries',* Cambridge University Press, 2002. (Cited as: Crawford 2002)

Crawford, James, '*Brownlie's Principles of Public International Law',* Oxford University Press, 2012. (Cited as: Crawford 2012)

Cryer, Robert, '*International Criminal Law*' in Evans, Malcolm D. (ed.), '*International Law',* Oxford University Press, 2018, 743 - 773. (Cited as: Cryer 2018)

Damgaard, Ciara, '*Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues',* New York: Springer, 2008. (Cited as: Damgaard 2008)

Dixon, Martin, '*Textbook on International Law',* Oxford University Press, 2013. (Cited as: Dixon 2013)

Fox, Hazel, '*The Law of State Immunity',* Oxford University Press, 2008. (Cited as: Fox 2008)

Grover, Leena, '*Interpreting the Crime of Aggression',* in Kress, Claus & Barriga, Stefan (ed.), '*The Crime of Aggression: A Commentary',* Cambridge University Press, 2017, 375 - 411. (Cited as: Grover 2017)

Hall, Stephen, *'Researching International Law'* in McConville, Michael & Chui, Wing Hong (ed.) '*Research Methods for Law',* Edinburgh University Press, 2017, 253 - 279. (Cited as: Hall 2017)

Kirsch, Philippe, '*Foreword*', in Dörmann, Knut, '*Elements of War Crimes Under the Rome Statute of the International Criminal Court',* Cambridge University Press, 2003. (Cited as: Kirsch 2003)

Klabbers, Jan, '*International Law',* Cambridge University Press, 2017. (Cited as: Klabbers 2017)

Koivu, Virpi, '*Head-of-State Immunity V. Individual Criminal Responsibility Under International Law*', in Koskenniemi, Martti & Petman, Jarna (ed.), *'Finnish Yearbook of International Law*, *vol. VII'*, Helsinki: Brill | Nijhoff, 2001, 305 - 330. (Cited as: Koivu 2003)

McConville, Michael & Chui, Wing Hong, '*Introduction and overview'* in McConville, Michael & Chui, Wing Hong (ed.) '*Research Methods for Law',* Edinburgh University Press, 2017, 1 - 17. (Cited as: McConville & Chui 2017)

Pedretti, Ramona, '*Immunity of Heads of State and State Officials for International Crimes',* Leiden: Brill | Nijhoff, 2015. (Cited as: Pedretti 2015)

Reydams, Luc, '*Universal jurisdiction: international and municipal legal perspectives',* Oxford University Press, 2003. (Cited as: Reydams 2003)

Schabas, William, '*Genocide in International Law: The Crime of Crimes',* Cambridge University Press, 2009. (Cited as: Schabas 2009)

Schreuer, Christoph H., '*State Immunity: Some Recent Developments',* Cambridge: Grotius Publications Ltd, 1988. (Cited as: Schreuer 1988)

Scovazzi, Tullio & Citroni, Gabriella, '*The Struggle Against Enforced Disappearance and the 2007 United Nations Convention',* Leiden: Martinus Nijhoff Publishers, 2007. (Cited as: Scovazzi & Citroni 2007)

Shaw, Malcolm N., '*International Law',* Cambridge University Press, 2008. (Cited as: Shaw 2008)

Staker, Christopher, '*Jurisdiction*' in Evans, Malcolm D. (ed.), '*International Law',* Oxford University Press, 2018, 289 - 315. (Cited as: Staker 2018)

Wickremasinghe, Chanaka, '*Immunities Enjoyed by Officials of States and International Organizations'*, in Evans, Malcolm D. (ed.), '*International Law',* Oxford University Press, 2018, 349 - 382. (Cited as: Wickremasinghe 2018)

Wrange, Pål, '*The Crime of Aggression, Domestic Prosecutions and Complementarity*' in Kress, Claus & Barriga, Stefan (ed.), '*The Crime of Aggression: A Commentary',* Cambridge University Press, 2017, 704 - 751. (Cited as: Wrange 2017)

Yang, Xiaodong, '*State Immunity in International Law',* Cambridge University Press, 2012. (Cited as: Yang 2012)

Journal Articles

Akande, Dapo & Shah, Sangeeta, *'Immunities of State Officials, International Crimes, and Foreign Domestic Courts'*, (2011) European Journal of International Law 21(4), 815 - 852. (Cited as: Akande & Shah 2011)

Barker, Craig, 'Negotiating the Complex Interface between State Immunity and Human Rights: An Analysis of the International Court of Justice Decision in Germany v. Italy', (2013) International Community Law Review 15(4), 415 - 436. (Cited as: Barker 2013)

Bekker, Pieter, '*World Court Orders Belgium to Cancel an Arrest Warrant Issued Against the Congolese Foreign Minister'*, (2002) Asil Insights 7(2). (Cited as: Bekker 2002)

Boed, Roman, '*The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*', (2000) Cornell International Law Journal 33(2), 297 - 330. (Cited as: Boed 2000)

Bradley, Curtis & Helfer, Laurence, 'International Law and the U.S. Common Law of Foreign Official Immunity', (2010) The Supreme Court Review 2010(6), 213 - 273. (Cited as: Bradley & Helfer 2010)

Brown, Bartram S., '*The Evolving Concept of Universal Jurisdiction*', (2001) New England Law Review 35(2), 383 - 398. (Cited as: Brown 2001)

Bruun, Lori Lyman, '*Beyond the 1948 Convention - Emerging Principles of Genocide in Customary International Law´*, (1993) The Maryland Journal of International Law & Trade 17(2), 193 - 226. (Cited as: Bruun 1993)

Bröhmer, Jürgen, '*Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator*', (1999) Leiden Journal of International Law 12(2), 361 - 372. (Cited as: Bröhmer 1999)

Caplan, Lee M., '*State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*', (2003) The American Journal of International Law 97(4), 741 - 781. (Cited as: Caplan 2003)

Cassese, Antonio, ‘*When may Senior State Officials be Tried for International Crimes? Some Comments on the Congo V. Belgium Case’*, (2002) European Journal of International Law 13(4), 853 - 875. (Cited as: Cassese 2002)

Colangelo, Anthony J., ‘*The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes*’, (2005) Georgetown Journal of International Law 36(2), 537 - 604. (Cited as: Colangelo 2005)

Colangelo, Anthony J., ‘*The Legal Limits of Universal Jurisdiction*’, (2006) Virginia Journal of International Law 47(1), 149 - 200. (Cited as: Colangelo 2006)

Davis, Michael P., ‘*Accountability and World Leadership: Impugning Sovereign Immunity'*, (1999) University of Illinois Law Review 1999(4), 1357 - 1382. (Cited as: Davis 1999)

Foakes, Joanne, ‘*Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts'*, (2011) The Royal Institute of International Affairs, 2011. (Cited as: Foakes 2011)

Fournet, Caroline, ‘*The Universality of the Prohibition of the Crime of Genocide, 1948-2008'*, (2009) International Criminal Justice Review 19(2), 132 - 149. (Cited as: Fournet 2009)

Frulli, Micaela, ‘*The Draft Articles on Crimes Against Humanity and Immunities of State Officials - Unfinished Business?*’, (2018) Journal of International Criminal Justice 16(4), 775 - 793. (Cited as: Frulli 2018)

Gaeta, Paola, ‘*When is the Involvement of State Officials a Requirement for the Crime of Torture?*’, (2008) Journal of International Criminal Justice 6(2), 183 - 193. (Cited as: Gaeta 2008)

Gallagher, Katherine, ‘*Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture*’, (2009) Journal of International Criminal Justice 7(5), 1087 - 1116. (Cited as: Gallagher 2009)

Heller, Kevin Jon, ‘*What is an International Crime? A Revisionist History*’, (2017) Harvard International Law Journal 58(2), 353 - 420. (Cited as: Heller 2017)

Høgestøl, Sofie A. E., ‘*The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity´*, (2016) Nordic Journal of Human Rights 34(3), 147 - 156. (Cited as: Høgestøl 2016)

Hutchinson, Terry, ‘*The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law*’, (2015) Erasmus Law Review 8(3), 130-138. (Cited as: Hutchinson 2015)

Hutchinson, Terry & Duncan, Nigel, ‘*Defining and Describing what we do: Doctrinal Legal Research',* (2012) Deakin Law Review 17(1), 83-119. (Cited as: Hutchinson & Duncan 2012)

Kaleck, Wolfgang, ‘*From Pinochet to Rumsfeld: Universal Jurisdiction in Europe, 1998-2008*’, (2009) Michigan Journal of International Law 30(3), 927 - 980. (Cited as: Kaleck 2009)

Kamminga, Menno T., ‘*Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*’, (2001) Human Rights Quarterly 23(4), 940 - 974. (Cited as: Kamminga 2001)

Kress, Claus, ‘*The Crime of Aggression before the First Review of the ICC Statute*’, (2007) Leiden Journal of International Law 20(4), 851 - 865. (Cited as: Kress 2007)

Lakshman, Marasinghe, ‘*The Modern Law of Sovereign Immunity*’, (1991) The Modern Law Review 54(5), 664 - 684. (Cited as: Lakshman 1991)

Langer, Maximo, '*The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*', (2011) American Journal of International Law 105(1), 1 - 49. (Cited as: Langer 2011)

Luban, David, '*A Theory of Crimes Against Humanity*', (2004) The Yale Journal of International Law 29(1), 85 - 168. (Cited as: Luban 2004)

Mack, Eveylon Corrie Westbrook, '*Does Customary International Law Obligate States to Extradite or Prosecute Individuals Accused of Committing Crimes Against Humanity?*', (2015) Minnesota Journal of International Law 24(1), 73 - 100. (Cited as: Mack 2015)

Man-ho Chok, Brian, '*The Struggle between the Doctrines of Universal Jurisdiction and Head of State Immunity',* (2014) U.C. Davis Journal of International Law & Policy 20(2), 233 - 272. (Cited as: Man-ho Chok 2014)

Mettraux, Guénaël & Dugard, John & du Plessis, Max 'Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa', (2018) International Criminal Law Review 18(4), 577 - 622. (Cited as: Mettraux & Dugard & du Plessis 2018)

O'Keefe, Roger, 'Symposium on the Immunity of State Officials an "International Crime" Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely', (2017) American Journal of International Law Unbound 109, 167 - 172. (Cited as: O'Keefe 2017)

Parker, Karen, '*Jus Cogens: Compelling the Law of Human Rights',* (1989) Hastings International and Comparative Law Review 12(2), 411 - 464. (Cited as: Parker 1989)

Pérez-León Acevedo, Juan Pablo, '*The Close Relationship between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses'*, (2017) Anuario Mexicano De Derecho Internacional 17, 145-186. (Cited as: Pérez-León Acevedo 2017)

Philippe, Xavier, '*The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?'*, (2006) International Review of the Red Cross 88(862), 375 - 398. (Cited as: Philippe 2006)

Posner, Richard A., '*Conventionalism: The Key to Law as an Autonomous Discipline?*' (1988) The University of Toronto Law Journal 38(4), 333-354. (Cited as: Posner 1988)

Randall, Kenneth C., '*Universal Jurisdiction Under International Law*', (1988) Texas Law Review 66(4), 785 - 841. (Cited as: Randall 1988)

Ruys, Tom, '*Justiciability, Complementarity and Immunity: Reflections on the Crime of Aggression',* (2017) Utrecht Law Review 13(1), 18 - 33. (Cited as: Ruys 2017)

Sarkin, Jeremy, '*Why the Prohibition of Enforced Disappearance has Attained Jus Cogens Status in International Law',* (2012) Nordic Journal of International Law 81(4), 537 - 584. (Cited as: Sarkin 2012)

Schabas, William A., '*Prevention of Crimes Against Humanity*', (2018) Journal of International Criminal Justice 16(4), 705 - 728. (Cited as: Schabas 2018)

Toner, Paul J., '*Competing Concepts of Immunity: The (R)Evolution of the Head of State Immunity Defense*', (2004) Penn State Law Review 108(3), 899 - 928. (Cited as: Toner 2004)

Tunks, Michael A., '*Diplomats or Defendants? Defining the Future of Head-of-State Immunity*', (2002) Duke Law Journal 52(3), 651 - 682. (Cited as: Tunks 2002)

Unknown writer, *'United Kingdom Case Note'*, (1976) The American Journal of International Law 70(2), 364 - 367. (Cited as: United Kingdom Case Note 1976)

van der Oije, Pita J. C. Schimmelpenninck, '*A Surinam Crime before a Dutch Court: Post-Colonial Injustice or Universal Jurisdiction?'*, (2001) Leiden Journal of International Law 14(2), 455 - 476. (Cited as: van der Oije 2001)

van der Vyver, Johan D, '*Torture as a Crime Under International Law*', (2003) Albany Law Review 67(2), 427 - 464. (Cited as: van der Vyver 2003)

Watts, Arthur, '*The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers'*, (1994) Collected Courses of the Hague Academy of International Law, the Hague Academy of International Law 247, 9 - 130. (Cited as: Watts 1994)

Williams, Sarah, '*The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?*', (2013) Journal of International Criminal Justice 11(5), 1139 - 1160. (Cited as: Williams 2013)

Wirth, Steffen, '*Immunity for Core Crimes? the ICJ's Judgment in the Congo v. Belgium Case'*, (2002) European Journal of International Law 13(4), 877 - 893. (Cited as: Wirth 2002)

Wuerth, Ingrid, '*International Law in Domestic Courts and the Jurisdictional Immunities of the State Case*', (2012) Melbourne Journal of International Law 13(2), 819 - 831. (Cited as: Wuerth 2012a)

Wuerth, Ingrid, '*Pinochet's Legacy Reassessed*', (2012) American Journal of International Law 106(4), 731 - 768. (Cited as: Wuerth 2012).

Zappalà, Salvatore, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? the Ghaddafi Case before the French Cour De Cassation', (2001) European Journal of International Law 12(3), 595 - 612. (Cited as: Zappalà 2001)

Reports

Amnesty International, *Germany: End Impunity through Universal Jurisdiction*, *No Safe Haven Series no. 3*, 2008. (Cited as: Germany: End Impunity through Universal Jurisdiction (no Safe Haven Series no. 3) 2008)

Amnesty International, '*Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update'*, 2012. (Cited as: Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update)

Committee on Legal Affairs and Human Rights, Parliamentary Assembly, *Enforced Disappearances, Report to the Committee on Legal Affairs and Human Rights,* Doc. 10679, 2005. (Cited as: Enforced Disappearances, Report to the Committee on Legal Affairs and Human Rights 2005)

Human Rights Watch, *Basic Facts on Universal Jurisdiction, Prepared for the Sixth Committee of the United Nations General Assembly,* 2009, https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction . (Cited as: Basic Facts on Universal Jurisdiction 2009)

Institute of International Law*,* Thirteenth Commission, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law - Session of Vancouver*, 2001. (Cited as: Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law - Session of Vancouver 2001)

International Committee of the Red Cross, *'What is international humanitarian law?'*, undated. (Cited as: What is international humanitarian law?)

International Law Commission, Sixty-third Session, *Report of the International Law Commission*, A/66/10, 2011. (Cited as: A/66/10, 2011)

International Law Commission, Sixty-eight Session, *Fifth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction*, A/CN.4/701, 2016. (Cited as: A/CN.4/701 June 14, 2016)

International Law Commission, Sixty-ninth Session (Second Part), *Provisional Summary Record of the 3377th Meeting*, A/CN.4/SR.3377, 2017. (Cited as: A/CN.4/SR.3377, August 18, 2017)

International Law Commission, Seventy-first Session, *Seventh Report by the Special Rapporteur*, A/CN.4/729, 2019. (Cited as: A/CN.4/729, April 18, 2019)

International Law Commission, Seventy-first Session, *Crimes against humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading*, A/CN.4/L.935, 2019. (Cited as: A/CN.4/L.935 May 15, 2019)

United Nations Office on Genocide Prevention and Responsibility to Protect*, 'When to Refer Situations as "Genocide" - Guidance Note 1'*, undated. (Cited as: When to Refer Situations as "Genocide" - Guidance Note 1)

Resolutions

Kampala Review Conference, *Resolution RC/Res.6 of the Review Conference of the Rome Statute, "Amendments on the crime of aggression to the Rome Statute of the International Criminal Court",* RC/Res.6, 2010. (Cited as: RC/Res.6, June 11, 2010)

United Nations General Assembly, First Session, *United Nations General Assembly Resolution 96 (1), "the Crime of Genocide"*, A/RES/96(I), 1946. (Cited as: A/RES/96(I), December 11, 1946)

United Nations General Assembly, Twenty-ninth Session*, United Nations General Assembly Resolution 3314,* "*Definition of Aggression",* A/RES/3314(XXIX), 1974. (Cited as: A/RES/3314(XXIX), December 14, 1974)

United Nations General Assembly, Sixty-second Session, *United Nations General Assembly Resolution 62/66,* A/RES/62/66, 2007. (Cited as: A/RES/62/66, December 6, 2007)

Blogs

Adanan, Amina, *'Symposium on the Genocide Convention: Reflecting on the Genocide Convention at 70: How genocide became a crime subject to universal jurisdiction',* (2019) EJIL: Talk!, https://www.ejiltalk.org/symposium-on-the-genocide-convention-reflecting-on-the-genocide-convention-at-70-how-genocide-became-a-crime-subject-to-universal-jurisdiction/ . (Cited as: Adanan 2019, EJIL: Talk!)

Citroni, Gabriella, '*Swiss Court Finds No Immunity for the Former Algerian Minister of Defence Accused of War Crimes: Another Brick in the Wall of the Fight Against Impunity',* (2012) EJIL: Talk!, https://www.ejiltalk.org/swiss-court-finds-no-immunity-for-the-former-algerian-minister-of-defence-accused-of-war-crimes-another-brick-in-the-wall-of-the-fight-against-impunity/ . (Cited as: Citroni 2012, EJIL: Talk!)

Sadat, Leila, '*Why the ICC's Judgment in the al-Bashir Case Wasn't So Surprising',* (2019) Just Security, https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/ . (Cited as: Sadat 2019, Just Security)

Web Sites

http://legal.un.org/ilc/guide/4_2.shtml (Cited as: Analytical Guide to the Work of the International Law Commission)

https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures?p_auth=GShRyvXW (Cited as: Council of Europe - Chart of signatures and ratifications of European Convention on State Immunity)

http://www.internationalcrimesdatabase.org/Case/1090/Ferrini-v-Germany/ (Cited as: Ferrini v. Federal Republic of Germany - ICD Summary)

https://www.icc-cpi.int/Pages/cases.aspx (Cited as: ICC Web Sites - Cases)

https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=A440E11391847AB8C1257C60005AE1B2&action=openDocument&xp_countrySelected=CH&xp_topicSelected=GVAL-992BU6&from=state&SessionID=DRLPNPW8L4 (Cited as: Khaled Nezzar case - IHL database summary)

http://www.internationalcrimesdatabase.org/Case/790 (Cited as: Pinochet III 1999 – ICD Summary)

http://www.internationalcrimesdatabase.org/Case/1082/Bouterse/ (Cited as: Prosecutor-General of the Supreme Court v. Desiré Bouterse - ICD summary)

https://trialinternational.org/latest-post/amos-yaron/ (Cited as: Trial international web pages: Amos Yaron)

https://trialinternational.org/latest-post/ariel-sharon/ (Cited as: Trial International web pages: Ariel Sharon)

https://trialinternational.org/latest-post/desire-delano-bouterse/#section-2 (Cited as: Trial International web pages: Desiré Delano Bouterse)

https://trialinternational.org/latest-post/hissene-habre/ (Cited as: Trial International web pages: Hissein Habré)

http://legal.un.org/avl/ha/csm/csm.html (Cited as: UN Historic Archives - Convention on Special Missions)

http://legal.un.org/ilc/guide/7_7.shtml#fout (Cited as: UN International Law Commission - Crimes Against Humanity)

http://legal.un.org/ilc/guide/4_2.shtml (Cited as: UN International Law Commission - Immunity of State officials from foreign criminal jurisdiction)

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en (Cited as: UN Treaty Collection - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&clang=_en (Cited as: UN Treaty Collection - Convention for the Protection of All Persons from Enforced Disappearance)

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en (Cited as: UN Treaty Collection - Convention on Jurisdictional Immunities of States and Their Property).

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-9&chapter=3&clang=_en (Cited as: UN Treaty Collection – Convention on Special Missions)

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en#EndDec (Cited as: UN Treaty Collection - Convention on the Prevention and Punishment of the Crime of Genocide)

Other

International Committee of the Red Cross, *Rule 98 of Customary International Law by ICRC: Enforced Disappearance is Prohibited.* (Cited as: Rule 98 of Customary International Law by ICRC)

International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries,* 1996. (Cited as: Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries 1996)

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries,* 2001. (Cited as: Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001)

Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*, 2001. (Cited as: The Princeton Principles on Universal Jurisdiction 2001)

Wood, Michael & Sender, Omri, '*State Practice*', Max Planck Encyclopaedias of International Law, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1107. (Cited as: Wood & Sender 2017, Max Planck Encyclopaedias of International Law)

1. Introduction

1.1 Research question and method

The thesis is focused on two battling concepts: head of state immunity from criminal proceedings in foreign national courts and accountability of heads of state for international crimes and human rights violations they have committed. These concepts are studied in the light of the developments after a remarkable judgment by the United Kingdom's House of Lords regarding Chile's former president Augusto Pinochet, who according to the judgment did not enjoy immunity of a former head of state for crimes of torture.[1] This year, 20 years have passed since this revolutionary judgment was given on March 24, 1999.

Head of state immunity can be derived from state immunity[2], although currently it must be considered as a distinguished concept from the rules of state immunity.[3] Most notable efforts in the area of immunities in general are the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 (the UN Immunities Convention). This convention, however, is not yet in force[4], thus developments of customary international law are very important in this area. There is the European Convention on State Immunity 1972 (the European Immunity Convention) in force, but it has been ratified by only 8 countries.[5] Regarding diplomatic immunity, the main conventions are the Vienna Convention on Diplomatic Relations 1961 (the VCDR) and the Vienna Convention on Consular Relations 1963 (the VCCR). In certain cases, these conventions can be relevant regarding head of state immunity, since the treatment between diplomats and heads of state can be on occasion compared.[6] There is no separate convention regarding only head of state immunity. However, International Law Commission (ILC) has been drafting articles on immunity of state officials from foreign criminal jurisdiction since 2006, but the work is not yet finished.[7]

[1] See the Pinochet III 1999.
[2] Wuerth 2012, p. 734.
[3] Alebeek 2008, p. 2.
[4] See UN Treaty Collection - Convention on Jurisdictional Immunities of States and Their Property, visited on January 25, 2019. In order for the Convention to come into force, thirty states must have deposited their instruments of ratification, acceptance, approval, or accession with the UN secretary-general. Currently, there are 28 states which have signed this convention and 22 member states.
[5] See Council of Europe - Chart of signatures and ratifications of European Convention on State Immunity, visited on January 26, 2019.
[6] Zappalà 2001, p. 598.
[7] Analytical Guide to the Work of the International Law Commission, visited on October 14, 2019.

This can be counted as an important expression of opinion in the area of head of state immunity. Thus, currently customary international law plays the most central role when trying to reconcile head of state immunity and current requirements of international criminal and human rights law. The aim of the thesis is to study accountability in foreign domestic courts, thus international accountability in permanent and special international ad hoc courts is excluded from the scope of the thesis. The question is important since international courts do not have the capacity to prosecute all the people committing international crimes and human rights violations in the world, so input from the national courts is very much needed.[8] The process in international courts can be very slow and bureaucratic.

The research question of the thesis is "Is there a human rights exception to the head of state immunity from foreign criminal jurisdiction?". Human rights exception in the context of the thesis does not mean only the violation of international criminal law, but also human rights law in general.[9] The research question will be studied mostly in the light of customary international law regarding immunity rules for the reasons stated above. It must be noted that customary international law must be studied through state practise and *opinio juris*, which means that also omissions must be taken into consideration to a relevant extent. This means that acts, where states have refrained themselves from doing something or have not considered an aspect they should or could have considered, are to be counted as well.

The research question is being studied by using the doctrinal research method. The aim is to map out the current situation of head of state immunity and through thorough review of state practise and *opinio juris*, to conclude whether there actually exists a human rights exception to head of state immunity and what is the scope of the exception.

1.1.1 The Doctrinal Method

Legal research differs from other fields of science with its distinctive methods. Some legal

[8] Foakes 2011, p. 1.
[9] It must be noted that all the violations of human rights are not violations of international criminal law. Currently, widely accepted core international crimes are genocide, crimes against humanity, war crimes, and the crime of aggression (obviously all including serious violations of human rights), see in more detail the Rome Statute of the International Criminal Court. However, it will be studied in the thesis that if there is an existing human rights exception, what would be the scope of the exception: would it include only a certain crime or crimes or even human rights violations, which do not constitute to international crimes.

scholars even think that there is no place for specific methodology in legal study.[10] However, time has passed this point of view and currently methods in legal research are becoming even more distinctive and even more manifold.

The doctrinal method represents one of the three general research methods or schools of thought of international law, doubtless there are many more.[11] Doctrinal research aims to systematize and clarify the current status of a certain legal question.[12] This is being done through relevant sources of international law, such as court judgments, statutes and treaties, rules of customary international law and other statements and writings of the scholars. Thus, doctrinal method in its basic form does not include considerations on about how things should be but is researching how matters actually are.

This does not mean that doctrinal research lacks evaluation and critical analysis. When considering, how the current status of a certain legal question actually is, this is done through critical evaluation of the legal material available and with careful scrutiny on actually which material is relevant in relation to the legal issue in question.[13] Thus, there is an essential critical element in the method as well.

The doctrinal research necessarily borrows reasoning logics from e.g. philosophy, such as induction and deduction. These are needed in order for the researcher to be able to draw conclusions from the vast material in front of them. In doctrinal research it is important to categorize material and try to find similarities and differences from the appropriate material. Thus, the doctrinal research method is about making connections.

The doctrinal research method has developed quite intuitionally and can be described as one of the core research methods.[14] Basically, doctrinal research represents the relevant material and systemizes it into categories by bundling some matters together, such as similarities in national legislations in relation to a certain question, or by differentiating things into different categories by identifying their differences in opinions or differences in status or nature of the material, such as whether it represents an opinion of a certain state or is a wider shot on consensus of international community as a whole, through which a

[10] Posner 1988, p. 345.
[11] The others are critical and rationalist.
[12] McConville & Chui 2017, p. 4.
[13] Hutchinson 2015, p. 131.
[14] Hutchinson & Duncan 2012, p. 85.

clarification to a certain legal issue can be drawn. In this analysis it is also important to notice which are the stable, settled norms and rules and which are only emerging.[15]

This research method is very expected, when studying changes in customary international law. In the thesis, the aim is to map out whether there actually is an established exception to head of state immunity. This is best done through systematizing of the legal material. A different setting of the question would perhaps attract a different method. However, when the question is aiming to examine whether an exception actually exists currently, doctrinal method is the natural fit.

The doctrinal research method has been widely criticized as well.[16] It has countered some scepticism stating that is it too of a simplistic method and self-evident.[17] However, although when described, the doctrinal method may sound simple, it is one of the most needed tools when studying legal issues. Most often the issues themselves are complex, of which clear method helps to analyse.

In the thesis, the relevant case law is categorized by their conclusions: whether a case is actually supporting the existence of a human rights exception or not or whether the case is actually an important case in relation to head of state immunity and human rights violations, but for some reason or other, does not take a stand on whether some kind of human rights exception should exist in foreign criminal proceedings. In customary international law also these cases are important, since it is important to study the omissions and what does it mean in relation to the formation of an exception. Additionally, the similarities of national criminal legislations are considered as well as the similarities of national immunity acts. The aspects of different multilateral treaties and basic, common features of international crimes are introduced through applicable international crimes. Furthermore, international conventions and draft articles regarding the subject are examined to the extent they are applicable as are other statements as well. All the notions of the material are being considered in the conclusion chapter where the existence of such an exception is determined.

[15] This is based on Martha Minow's, the former Dean of Harvard law School, list on legal research methods. See Hutchinson & Duncan 2012, p. 103.
[16] Hutchinson 2015, p. 131.
[17] Hutchinson & Duncan 2012, p. 106.

1.2 Scope

The scope of the thesis is head of state immunity in criminal proceedings of foreign national courts. Thus, immunity in international courts and tribunals is excluded from the scope. These exclusions are done because head of state immunity in foreign courts is in itself a complicated question and immunity in international courts is also an interesting matter, but it is based on a lot of different legal material. Where head of state immunity in front of foreign courts is mostly based on customary international law, immunity in international courts is based on special charters and statutes of the courts and tribunals. Thus, head of state immunity in international courts shall be excluded for the sake of clarity. This also allows to study head of state immunity in foreign national courts in more detailed manner.

Head of state immunity is being considered in two different forms: when a head of state is holding the office and when a head of state has left the office. These two sides of head of state immunity are considered somewhat separately, since they differ quite a lot as discussed later in more detail. The thesis focuses on the immunity from suit as opposed to immunity from enforcement.

The timeline for this thesis is from March 1999 to present day, thus, the thesis considers the developments after the Pinochet III judgment.

The thesis is also only concerned on criminal liability of heads of state and immunity in civil proceedings is excluded. This allows even more deep and clear analysis, and in any case civil proceedings in foreign national courts are rare, at least for the sitting heads of state.[18] Additionally, international crimes and human rights violations also in themselves tip the scope towards criminal responsibility, although it is also important to get monetary compensation from the crimes suffered.

1.3 Structure

The thesis will first start with an introduction to the concept of immunity, and of course focusing to head of state immunity and developing a strong base for the current concept of head of state immunity and its relations to state immunity and diplomatic immunity. Second, the concept of head of state immunity will be deepened by differentiating two

[18] Wuerth 2012, p. 741.

parts of it: *ratione personae* and *ratione materiae* i.e. personal immunity and functional immunity. This differentiation is important because only an acting head of state enjoys personal immunity, whereas a former head of state enjoys only functional immunity.[19] Thirdly, the thesis will study more the current state of international criminal and human rights law. After that, immunity concept and the requirements of international criminal and human rights law are being reconciled through examination of state practise and *opinio juris*. Finally, it will be concluded whether there is actually a human rights exception to head of states immunity and if so, what is the scope of the exception.

The outcome of the study will be represented in relation to *ratione personae* and *ratione materiae.* It will be concluded, that there is not a human rights exception to the immunity of acting head of state. However, there is a human rights exception to the immunity of former head of state, at least in relation to certain international crimes.

1.4 Terminology

There is some terminology in the thesis, which needs to be clarified. First of all, the term head of state is very broad. It varies from state to state, since head of state is dependant from the domestic laws of each state and the functions of a head of state may vary from very ceremonial to political.[20] Head of state may vary from monarch to president as well. Thus, it is hard to generalise the term head of state. However, there are some features that are common to all heads of state. First of all, generally the constitution of a state determines the person or body, who is the head of state and their powers. The heads of state have competence to act on behalf of their states in international relations.[21] This means that head of state is able to conclude and bring to an end international treaties.[22] In order for a head of state to be able to enjoy immunity, two conditions have to be met. First, a head of state must be the head of a sovereign and independent state, which is possessing legal personality. Second, a head of state needs to be identified as the legitimate titular of that office.[23]

[19] Alebeek 2008, p. 2. Personal immunity is broader, covering all acts while the head of state holds office, whereas functional immunity relates only acts done in official capacity when head of state was holding the office.
[20] Fox 2008, p. 669. See also Pedretti 2015, p. 9.
[21] Pedretti 2015, p. 9.
[22] See Articles 7(2)(a) and 67(2) of the Vienna Convention on the Law of Treaties 1969.
[23] Pedretti 2015, p. 10 - 11.

Heads of state are often equated with heads of government and ministers for foreign affairs. This was stated for example by International Court of Justice (ICJ) in its judgment of the Democratic Republic of the Congo v. Belgium case (the Arrest Warrant case).[24] Thus, decisions in relation to heads of government and ministers for foreign affairs can be quite straight-forward applied to heads of state as well. In regard to decisions on other state officials and representatives, these arguments can be applied to heads of state to the extent applicable. Additionally, for example in ILC's work on immunity of state officials from foreign criminal jurisdiction, the ILC has also equated heads of state, heads of government and ministers for foreign affairs.[25] The reasoning for this is that these three, at least, are persons, who can actually represent state abroad without any exchange of credentials, but the obligation to treat them with in respect of their dignity and freedom is truly rooted to their status as a holder of certain office.[26] This list is not exhaustive and it has been stated to include defence ministers and ministers for commercial and international trade, of which representation of a state equates very much with the status of a minister for foreign affairs.[27]

Human rights exception to head of state immunity studied in the thesis covers human rights violations that constitute into international crimes, but also other serious human rights violations. In this thesis there are four crimes that are counted as core international crimes: genocide, crimes against humanity, war crimes and crime of aggression.[28] All of these crimes are studied carefully later. Other possible international crimes and human rights violations which are considered in the thesis all include serious human rights violations of so-called 'hard core' human rights, which cannot be derogated.[29] These fundamental

[24] See the Arrest Warrant case 2002, para 53. In its judgment ICJ stated that "*a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office*."

[25] See A/CN.4/729, April 18, 2019, p. 69. In the draft article 3 it is noted that "*Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction.*"

[26] Fox 2008, p. 689.

[27] Crawford 2012, p. 500.

[28] See Cryer 2018, p. 744 - 745. There are different opinions on that which are considered to be international crimes. These four crimes are often called as core international crimes as they are called in this thesis as well. These are the crimes covered in the Rome Statute, which is said to reflect customary international law.

[29] Pérez-León Acevedo 2017, p. 151.

human rights are coming from the most successful international human rights treaties.[30] Thus, many human rights, such as many economic, social and cultural rights are not included in the definition of the human rights exception in the thesis.

1.5 Regulation: customary international law

As noted, in the absence of a treaty on head of state immunity, it is based on customary international law. Customary international law consists of state practise and *opinio juris*. Currently, these cannot be rigidly separated. The sources of state practise and *opinio juris* studied in the thesis include judgments by national courts, national legislation, multilateral conventions, the current work ILC is doing on immunity of state officials from foreign criminal jurisdiction, and also some judgments by international courts. The most prominent judgments by ICJ and European Court of Human Rights (ECHR) on immunity exceptions in national courts are included.

However, since international responsibility is excluded from the scope of the thesis, judgments and statutes of ICC, ICTY and ICTR are not considered in detail, but just through some examples of their general statements in relation to the subject. These courts are international in nature and their judgments are based on their own statutes, which are affecting immunities of officials tried in these courts. As such, they are not representing the issues studied in the thesis.

These two requirements of international law, state practise and *opinio juris,* are ancient, but have been codified first time in 1920 to the statute of the Permanent Court of International Justice, from where it was adopted to the statute of International Court of Justice in 1945.[31] The article 38 of the statute states that "*the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply - - international custom, as evidence of a general practice accepted as law - -*". The general practise part refers to state practise and *opinio juris* is what is accepted as law.

[30] These include, for example, the International Covenant on Civil and Political Rights 1966, the American Convention on Human Rights 1969 and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.
[31] Hall 2017, p. 258.

2. Introducing immunity

2.1 Jurisdiction

National courts may have jurisdiction over a case based on a few general principles of jurisdiction. Jurisdiction is relevant in relation to immunity, since immunity is 'immunity from jurisdiction'. General principles of jurisdiction are the territoriality principle, the nationality principle, the passive personality principle, the protective principle and the universality principle.[32] The most interesting and the most relevant basis for jurisdiction regarding international crimes and other serious human rights violations is universal jurisdiction, because it basically allows all of the states to prosecute perpetrators, who commit acts that are subject to universal jurisdiction. The reason behind this is that these acts are so heinous, that the whole international community has an interest to prosecute the perpetrators committing these acts. Universal jurisdiction will be studied in detail below, while the others are introduced here shortly.

The most fundamental jurisdiction principle is the principle of territoriality. Basically, it means that states can prosecute perpetrators, who have committed acts on their territory, which breach the laws in force on the territory.[33] This means that the principle does not take any stance on the nationality of the perpetrator. Hence, the accused can be a foreign committing for example international crimes. Thus, it can be a foreign head of state as well, in which case immunity questions arise. It must be noted that, if a domestic head of state commits crimes in a territory of his or her state, the courts of that state have obviously jurisdiction over those crimes and then immunity is not an issue either. However, it may be so that the state is not inclined to prosecute its own head of state, at least when the head of state still represents the current political power in the state.

The second basis for jurisdiction, which is also very much undisputed is the nationality principle. When a person commits crimes that breaches the criminal code of a state the person is a national of, that state can exercise jurisdiction over the person, even if the person would be outside its territory.[34] Since this principle allows states to prosecute its own

[32] Dixon 2013, p. 152 - 159.
[33] Klabbers 2017, p. 100.
[34] Staker 2018, p. 299. The nationality principle has even longer history than the territoriality principle.

nationals, the principle is not relevant in relation to head of state immunity questions in foreign domestic courts.

The passive personality principle relates to the nationality of the victim of the crime. This principle is still quite controversial. On the basis of this principle a state may try to exercise jurisdiction over a person for acts that have affected the nationals of that state, wherever the conduct has occurred.[35] Despite its controversiality, this principle could play a role as basis for jurisdiction in prosecutions which concern foreign heads of state and immunity questions.

Jurisdiction claim based on the protective principle means that a state considers that its national security or other vital interests are in danger due to possible criminal conduct.[36] Similarly, this conduct can also happen outside states territory. This principle might come into consideration, when international crimes or other serious human rights violations are being committed by a foreign head of state. In theory, this principle could play a role in a situation where international crimes are being committed inside the borders of a head of state's own state, but the situation is so aggressive and unpredictable that it might quite easily expand to a war on the territory of the neighbouring state. For example, if the head of state of Sweden would try to kill all Sami people inside Sweden, one could say that there is a risk that this genocide could spread to Finnish Sami people as well.

2.1.1 Universal jurisdiction principle

The above-mentioned international core crimes are crimes so heinous in their nature that they are "*the most serious crimes of concern to the international community as a whole*".[37] At least three of these four core crimes are subject to universal jurisdiction[38], which means that a state is entitled or even required to bring proceedings in respect of these crimes, irrespective of the location of the crime, and irrespective of the nationality of the victim or the perpetrator. The universality principle is thus presuming that all states have interest prosecuting perpetrators for these crimes.[39] Thus, universal jurisdiction is often the basis for international cases in national courts where head of state immunity questions arise. It

[35] Shaw 2008, p. 664.
[36] Wrange 2017, p. 715.
[37] Article 5(1) of the Rome Statute 1998.
[38] Damgaard 2008, p. 60.
[39] Randall 1988, p. 787 - 788.

is mandatory to first establish jurisdiction, since immunity is shorthand for immunity from jurisdiction.[40]

For a state to be able to prosecute under universal jurisdiction, there must a basis for it in international law.[41] This basis can be found straight from a treaty[42], but also in customary international law.[43] However, international conventions, where the universality principle is mentioned, only cover the member states of that convention, for example member states of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention). To the contrary, universal jurisdiction existing in customary law extends over the member states of a convention, covering all of the states. Only then, it is truly universal.[44] Currently, universal jurisdiction is regarded to exists in customary international law in relation to certain international crimes. All and all, universal jurisdiction means that prosecution of these international crimes can happen, when committed by any person anywhere in the world, thus it differs from other traditional jurisdiction principles.[45]

It must be noted that there are two different versions of the universal jurisdiction: more narrow and wide-spread version and broader and more absolute version.[46] According to the narrow version, a perpetrator must be in custody of the state, which wants to exercise jurisdiction over him or her. On the contrary, absolute universal jurisdiction does not require this. Thus, according to the absolute version of the universality principle criminal jurisdiction over a person may be exercised even if the person is not, or have not been, in the country at all.[47]

Regarding head of state immunity universal jurisdiction is of importance because, as mentioned before, head of state immunity questions are often questions, that are most likely

[40] Toner 2004, p. 903. See also the Arrest Warrant case, 2002.
[41] Koivu 2003, p. 306.
[42] For example, see the Torture Convention 1984. In article 7(1) of the Convention the "prosecute or extradite" principle is mentioned reflecting the universal jurisdiction: "*The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution*." This has been interpreted to be equivalent to the universality principle. See Koivu 2003, p. 307 - 308.
[43] Colangelo 2005, p. 567.
[44] Colangelo 2006, p. 168.
[45] Philippe 2006, p. 377.
[46] Cassese 2013, p. 278.
[47] It must be noted that national legislation regarding trials held *in absentia* must be taken into account.

to rise in connection with proceedings based on universal jurisdiction. One of the reasons for this is that international crimes that are subject to universal jurisdiction are often crimes, that are committed by the most high-ranking state officials, which heads of state are.[48] It will be examined more later, how head of state immunity is reconciling with the crimes under universal jurisdiction, since the reasoning behind universal jurisdiction is that it exists in order for the international community to have tools to intervene when most heinous of crimes happen. The question is, if immunities are granted for heads of state, is the whole purpose behind universal jurisdiction being watered down, so to speak?

2.2 Rationale of Immunity

There are many different but related rationales for head of state immunity, which are derived from state immunity. One of them is the sovereign equality of states, which is summarized in the Latin phrase "*par in parem non habet imperium"*. Basically, it means that no state can exercise jurisdictional power over another state, since all states are equally sovereign.[49] It must be noted that equality of states argument does not only argue on behalf of immunity, but it can also argue against it. All states would be equal as well, if none of them would be immune from others' jurisdiction.[50]

One of the most important arguments is the notion of functionality. In international relations, states need to be able to function properly through their officials without interference from other states. If immunity would not be granted to heads of state, when they are abroad, this could very much disturb the diplomatic relations between states and some states might take advantage of it whilst having improper intensions.[51] Without immunity the whole functioning of a state could paralyze. This functionality principle has been mentioned also in one of the most important cases ruled by the ICJ regarding state and head of state immunity, the Arrest Warrant case. In the judgment the Court held that "*In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States"*.[52] Thus, functionality of a state is very much a pragmatic ar-

[48] See Kamminga 2001, p. 955.
[49] Bröhmer 1997, p. 11.
[50] Ibid., p. 11.
[51] Brownlie 2008, p. 326 - 327.
[52] The Arrest Warrant case 2002, para. 53.

gument.

There are other arguments for head of state immunity as well. These are, for example, dignity of states and comity.[53] In this case, dignity of state refers to dignity of both states: the one who would assume jurisdiction over another state's officials and the one who would yield under another state's forcible submission. This kind of forcible assumption of jurisdiction over another state's officials would constitute an insult to the dignity of the submitting state and would not reflect well to the political relations of the state that has assumed jurisdiction.[54] However, it has been noted that this notion of state's dignity might not be as relevant as it was, when the ruler of a state equalled as the state. To this point, dignity can be seen also more as an attribute of a human, not one of a state, as it is more of an ethical concept.[55] In the case Schooner Exchange v. McFaddon, which is often considered to be the first definitive statement on the doctrine of foreign state immunity,[56] the U.S. court is referring to dignity,[57] which has said to be a referral to general comity as well.[58]

These considerations reflect the rationale behind head of state immunity as well as state immunity, since states cannot perform themselves, but only through their officials. After all, head of state immunity is derived from state immunity.

Next, head of state immunity itself must be studied. However, state immunity and diplomatic immunity will be introduced first, since these have relevant aspects similar to head of state immunity, which help understanding head of state immunity better as well.

2.3 State immunity

State immunity is a concept of customary international law, which means that states have immunity from prosecutions in a court of another state.[59] State immunity has developed from a very absolute doctrine towards the current restrictive doctrine of state immunity.

---

[53] Yang 2012, foreword, p. xvii.
[54] Lakshman 1991, p. 666.
[55] Bröhmer 1997, p. 10.
[56] Caplan 2003, p. 745.
[57] The Schooner Exchange v. M´Fadden 1812, p. 123. The Court noted that "*But it cannot be implied where the law of nations is unchanged, nor where the implication is destructive of the independence, the equality, and dignity of the sovereign*."
[58] Verlinden B.V. v. Central Bank of Nigeria 1983. The Court stated that "*As the Schooner Exchange made clear, however, foreign sovereign immunity is a matter of grace and comity --*".
[59] Alebeek 2008, p. 63.

This development can be seen also as possibility and background for changes in quite absolute head of state immunity towards possible human rights exception.

2.3.1 Absolute doctrine

When state immunity was first recognised, it was treated as a very absolute doctrine.[60] Absolute immunity meant that state could not be prosecuted in foreign courts at all, regardless the act.[61] However, it must be noted that even the absolute doctrine was not totally absolute. That is, states have always been able to give their consent to be prosecuted. Absolute immunity prevailed in international law during the 19th century and the reason, why it was possible to hold immunity that absolute was that at the time the acts of states were equal to sovereign acts, meaning that states were operating in a more traditional areas of administration, legislation, national defence and diplomatic relations.[62] Thus, states did not operate in the private economic sphere as they do today.

The Schooner Exchange v. M'Faddon is considered to be the first case regarding state immunity.[63] In the case, US Supreme Court granted immunity, which was invoked by the French emperor in an action for repossession of a ship which had been captured and converted into a warship by the French Navy. Chief Justice Marshall delivered the opinion of the US Supreme Court, stating that "*The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. --the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.*"[64] It must be noted, that the decision does not take any stance on commercial matters, thus it cannot be said in absolute certainty, whether the US Supreme Court has meant the immunity to be totally absolute. However, that is how the decision has been

[60] Fox 2008, p. 35.
[61] Yang 2012, p. 7.
[62] Ibid., p. 8.
[63] See the Schooner Exchange v. M'Fadden 1812.
[64] Ibid., para 136 and 147.

interpreted.[65]

Before the restrictive doctrine developed due to the fact that states engaged themselves in activities in the private sphere and commercial actions, there were some exceptions in the absolute immunity doctrine. First of all, a consent of a state, i.e. waiver of immunity was possible, as mentioned, and has been regarded as an exception to immunity.[66] Also, immovable property has always been an exception to immunity and national courts have been able to exercise jurisdiction over immovable property of another state.[67] These at least have been two clear exceptions to the absolute state immunity.[68]

After states started to act in the private sphere in commercial activities, the restrictive doctrine started to develop, since these acts where very different from the sovereign acts of states.

2.3.2 Restrictive doctrine

It cannot be pointed when was the exact moment, when the development of the restrictive doctrine started.[69] However, it became clearer that the changes in state immunity were going towards a more restrictive doctrine after the world war II. In the Philippine Admiral case, a famous English case by the Privy Council, the following was stated regarding state immunity: "*There is no doubt -- that since the Second World War there has been -- a movement away from the absolute theory of sovereign immunity -- towards a more restrictive theory. This restrictive theory seeks to draw a distinction between acts of a state which are done jure imperii and acts done by it jure gestionis and accords the foreign state no immunity either in actions in personam or in actions in rem in respect of transactions falling under the second head.*"[70]

Restrictive state immunity means that, while the absolute doctrine does not take a stance on the act of a state, the restrictive doctrine divides the acts of a state as *acta jure imperii*,

[65] Yang 2012, p. 8 - 9.
[66] Brownlie 2008, p. 327.
[67] See for example, MacArthur Area Citizens v. Republic of Peru 1987, para 920 - 921, Fickling v. Australia 1991, p. 72, Third Avenue Associates v. Yugoslavia 2000 and Gutch v. Federal Republic of Germany 2006, para 15.
[68] There have possibly been other exceptions to the absolute state immunity doctrine as well, here just naming the two.
[69] Brownlie 2008, p. 327 - 328. The exact moment is hard to define, but the world wars increased commercial activities enhancing the development of the restrictive doctrine.
[70] United Kingdom Case Note 1976, p. 365.

sovereign acts, and *acta jure gestionis*, commercial acts.[71] This means, that states still have immunity in relation to acts done within their sovereign functions, but when states engage themselves in private commercial acts, they can face prosecution. This can be considered fair, since other players in the commercial activity field do not have immunity either. In order for the current global economic to work, it seems quite absurd for today's point of view, that states would have immunity when they are acting as private actors. This could lead to discriminating situations and eventually even boycotting towards commercial agreements with sovereign states.

It must be noted that even though the restrictive state immunity is now the prevailing view to state immunity, there are still states supporting the absolute doctrine.[72] However, it seems that they are only supporting it technically, while they are actually applying the restrictive doctrine instead.[73]

2.3.3 Relationship between state immunity and head of state immunity

While the history of state immunity is a history from absolute doctrine to restrictive, norms governing head of state immunity have followed this development. During the time of absolute state immunity, head of state was still closely identified as the state itself.[74] Then, more distinct rules of head of state immunity started to develop alongside the changes in state immunity towards the restrictive doctrine. Thus, state immunity and head of state immunity are related. It can be perceived other way as well. It is noted that especially when the official functions of a state in a broad sense are in question, the two type of immunities are closely related. Jurgen Bröhmer has noted that "*In fact, state immunity proper, which is now regarded as an immunity ratione materiae, is an offspring of the immunity rationae personae formerly afforded to the sovereign ruler who personified the state. From an intertemporary point of view, the former head of state still in some way personifies and represents his state for that particular period of time.*"[75] This statement is also emphasising the importance of a state's functionality through its officials, since immunity *ratione materiae* is the functional part in the concept of head of state immunity. When considering

[71] Bröhmer 1997, p. 1.
[72] Yang 2012, p. 13.
[73] Although the UN Immunities Convention 2004 is not yet in force, it serves as a good indication of the popularity of the restrictive doctrine of state immunity.
[74] Wickremasinghe 2018, p. 363.
[75] Bröhmer 1999, p. 364.

functional immunity, the acts done must have a nexus to the official functions of a state. It is clear that a state is not able to function as a legal person but must act through its officials. This fact calls after the initial nexus of head of state immunity and state immunity, which was even more emphasised when they were the same matter – when the head of state was the state, *l'état c'est moi*.[76] Functional and personal aspects of head of state immunity are examined in more detail later.

It must be noted that there is one significant difference between these two types of immunities: distinction between *acta jure imperii* and *acta jure gestionis* is only relevant to state immunity. Head of state immunity is also divided into two different parts, *ratione personae* and *ratione materiae*, but these are distinctively different from the *jure gestionis/jure imperii* categorization. In head of state immunity *ratione materiae*, it is important, whether the act is official or private, since only official acts are covered by this type of immunity, whereas immunity *ratione personae* is not concerned with the nature of the act. Immunity *ratione materiae* is reserved for former heads of state and immunity *ratione personae* for incumbent heads of state. As said, more of them will be studied later. However, this difference between head of state immunity and state immunity can lead to situations where a former head of state enjoying immunity *ratione materiae* cannot be prosecuted based on the immunity, but the state itself can be prosecuted.[77] The former head of state would be immune not only with respect to sovereign acts for which the state is immune but also in proceedings relating to official but non-sovereign acts.[78] Additionally, immunity *ratione personae*, which protects incumbent heads of state irrespective of the nature of the act, would protect the head of state, whereas in relation to commercial activities the state itself would not enjoy state immunity.[79]

The difference between the rules of state immunity and head of state immunity is relevant in relation to exceptions to these immunities as well. There are certain exceptions to state immunity, which are often mentioned in national legislations. The most relevant to mention here is the so-called torts exception. This exception to state immunity can be found

[76] This quote was famously stated by the French King Louis XIV in the 18th century.
[77] For example, when a head of state has made some commercial purchases to states account while in office. From head of state immunity point of view, this would be considered as an official conduct and thus covered by that immunity. When considering state immunity though, this is a commercial act, from which the state is not immune of according to the restrictive doctrine, which is the current prevailing doctrine.
[78] Akande & Shah 2011, p. 827. This means that head of state immunity is broader than state immunity.
[79] This is relevant in connection with the restrictive doctrine of state immunity.

from many common law acts on state immunities.[80] Tortious act can include anything from damages to individual's property to personal injuries or even acts causing death. Thus, some acts falling under the torts exception can be acts, which injure 'life, limb or liberty' and may then violate international criminal and human rights law alongside domestic law. When these actions violate both the domestic law and the international law, a human rights exception to state immunity may materialize through torts exception.[81] This kind of exception to state immunity may be established even though an act would be a sovereign act. However, as mentioned, these domestic immunity acts are covering state immunity and currently, the rules of head of state immunity are separate from state immunity albeit they are still related. Thus, torts exception and possible human rights exception through it to state immunity does not apply to head of state immunity and the exceptions to head of state immunity must be considered separately from the exceptions to state immunity, although some common exception may exist as well. However, this gives hope that a human rights exception to any kind of immunity could work as the differentiation between different kinds of acts has worked in customary international law.[82]

2.4 Diplomatic immunity

Diplomatic immunity relates to head of state immunity as well, since it can serve partly as analogy to head of state immunity. The difference between the regulations of head of state immunity and diplomatic immunity is that head of state immunity is mostly based on customary international law whereas diplomatic immunity is based on an international treaty. Diplomatic immunity is regulated in the VCDR. Article 39(2) of the VCDR can be used as analogy to functional head of state immunity. It states "*When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist*." This same principle applies to functional head of state immunity as well, which is examined more later.

[80] See for example United States' Foreign Sovereign Immunities Act 1976, United Kingdom's State Immunity Act 1978, Australia's Foreign Sovereign Immunities Act 1985 and Canada's State Immunity Act 1982.
[81] Schreuer 1988, p. 57.
[82] Davis 1999, p. 1372.

International diplomatic law also recognises certain kinds of special missions and these norms are codified in the UN Convention on Special Missions 1969.[83] These rules can be applied to heads of state as they are. Article 21(1) of the Convention notes that "*The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.*"

In the Pinochet III trials Chilean government tried to invoke diplomatic immunity as well.[84] The facts that Pinochet was travelling with diplomatic passport and his travel plans were informed to the British authorities were not enough to give him diplomatic status.[85] The status of an ad hoc diplomat of a special mission was not discussed, maybe because United Kingdom is not party to the Convention on Special Missions. However, it has been stated that the ad hoc diplomat status would be part of customary international law as well.[86]

There are different opinions on which of these aforementioned doctrines, state immunity or diplomatic immunity, is closer to head of state immunity.[87] In any case, they both are relevant, either just as background or related concept, which can serve as analogy.

2.5 Head of State immunity

Head of state immunity is derived from the doctrine of state immunity, but there are similarities to diplomatic immunity as well. There is no separate treaty regarding head of state immunity, thus it is very much based on customary international law.[88]

Historically, head of state immunity is resulting from the relationship between a state and its ruler, since the state was personified in the ruler.[89] Over time the ruler of a state separated from the state itself as an entity.[90] The connection to diplomatic immunity comes from the functional side of a head of state's position.[91] Thus, head of state immunity is

---

[83] The Convention on Special Missions has only 39 member states. Thus, it has not been widely taken up. See UN Treaty Collection - Convention on Special Missions, visited on October 15, 2019.
[84] See Pinochet III 1999.
[85] Bröhmer 1999, p. 366.
[86] See UN Historic Archives - Convention on Special Missions, visited on November 7, 2019.
[87] Bröhmer 1999, p. 368 - 369.
[88] International Law Commission is currently drafting articles on immunity of state officials from foreign criminal jurisdiction.
[89] Pedretti 2015, p. 13.
[90] Ibid., fn 28.
[91] Bröhmer 1997, p. 30.

divided into two parts: *ratione personae,* i.e. personal immunity and *ratione materiae*, i.e. functional immunity.

2.5.1 Ratione personae

Immunity *ratione personae*, the personal or status-based immunity, means head of state immunity, which is attached to the office a head of state holds.[92] This means that as long as head of state holds the office, his actions are covered by this personal immunity. This personal immunity is reserved only to highest ranking officials, to which heads of state clearly belong.[93] While there is no complete list of which other positions this 'high-ranking officials' include, heads of state are often placed in the same category with at least heads of government and ministers for foreign affairs.[94] Thus, other than those officials, which may truly represent their state in its entirety without exchanging any credentials, are not enjoying immunity *ratione personae.* When a head of state leaves the office, personal immunity ceases to exist and then the head of state is only covered by functional immunity, which is introduced below.

Personal immunity covers all kinds of acts done by a head of state, while he or she is holding the office. This means official acts done as part of state functions, but also private acts.[95] It must be noted, that also acts done before assuming office are covered by immunity *ratione personae*, thus generally, an incumbent head of state cannot be prosecuted even for the acts they have committed before taking office as a private individual or as a lower level state official.[96] This is logical, since if the acts done before assuming office would not be covered by immunity *ratione personae*, then the basic function of personal immunity would suffer: the inviolability of a head of state. Still, personal immunity lasts only while a head of state holds office, which can be described as an inherent exception or a weak spot to head of state immunity.

The reason for having such an absolute immunity, that covers also the private acts during the term of the office, is that the fluent relations between states and their proper

---

[92] Akande & Shah 2011, p. 818.
[93] Fox 2008, p. 673 - 675. See also Cassese 2002, p. 864.
[94] See for example the Arrest Warrant case 2002, para 53, Yang 2012, p. 434, Crawford 2012, p. 500 and Fox 2008, p. 669 - 671.
[95] Wirth 2002, p. 883. Wirth notes that immunity *ratione personae* covers all acts done while in the office, "regardless of the conduct in question".
[96] The Arrest Warrant case 2002, para 54 - 55.

functioning must be secured.[97] This is the reason, why the personal immunity is reserved only for the highest-ranking officials having international influence outside their own state. Without this kind of immunity, it would be possible, and in some cases quite probable, that there would be interference by foreign states in a form of prosecution when a head of state of a certain country would enter abroad. Heads of state perform the most important tasks of states; thus, it is essential that these tasks can be completed without harassment by other states.[98]

When personal immunity of head of state covers the official as well as the private acts, it can be described as absolute. In the Arrest Warrant case by ICJ, which considered immunity of an acting Congolese minister for foreign affairs in a foreign court, immunity *ratione personae* is expressed quite strictly: "*he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties*".[99]

2.5.2 Ratione materiae

Immunity *ratione materiae*, the functional immunity, is a form of head of state immunity that continues to cover the official acts done by a head of state while he or she was holding the office. Thus, the nature of the act takes the centre stage here, not the person, who commits the act. For the act to be official it must fulfil two requirements: first of all, it must be based on a state policy, thus it cannot be an act a private individual could do, and the act must be carried out using an apparatus of the state.[100] This means that if a head of state performs an act, which solely benefits their own agenda, it cannot be considered as an official act covered by functional immunity.

Immunity *ratione materiae* is enjoyed by former heads of state for official acts performed while in office, thus it does not cover acts done before assuming office nor acts after leaving office.[101] This way, it differs from personal immunity, which covers also acts conducted before assuming office. This limited temporal nature has been stated also in ILC's report on

[97] Akande & Shah 2011, p. 818.
[98] Tunks 2002, p. 656 - 657.
[99] The Arrest Warrant case 2002, para. 54.
[100] Akande & Shah 2011, p. 832.
[101] The Arrest Warrant case 2002, para 61.

its sixty-third session in relation to the draft articles on immunity of state officials from foreign criminal jurisdiction.[102] Thus, when a head of state is leaving office, the acts they have done before taking office are not anymore covered by immunity as they were when a head of state was in office.

Functional immunity is a form of immunity which is reserved for former heads of state. Additionally, its enjoyed by sitting state officials, who are not covered by immunity *ratione personae*.[103] Thus, when a head of state leaves office, immunity *ratione materiae* may be invoked, when the head of state is accused in a foreign court for acts done while being the head of state and the conduct may be considered as an official state conduct.[104] This form of head of state immunity is similar to diplomatic immunity given to diplomatic agents of a state according to the VCDR.[105] The reasoning behind functional immunity is that it hinders states for getting prosecuted in the courts of foreign states through their officials[106], since states can only act through their officials.[107] However, it can be stated that this reasoning is not equally relevant to former heads of state as it is to other incumbent state officials.

Functional immunity is, or can be seen, as an inherent exception to head of state immunity: when a head of state leaves office, their conduct is covered by immunity only for the acts performed in official capacity. That is quite a big difference to the personal immunity described above, which covers also the private acts of an acting head of state. It is important to notice though that this inherent exception to absolute head of state immunity as a whole is not the exception discussed about in the thesis.[108] Human rights exception is a distinctive doctrine, which does not only relate to the differentiation between private and official acts, but is a separate, larger doctrine that may include certain kinds of acts, which violate international criminal and human rights law.

[102] A/66/10, 2011, p. 219.
[103] Wuerth 2012, p. 732.
[104] Pedretti 2015, p. 14 - 15.
[105] Article 39(2) of the VCDR states that "*When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist*." See also Wickremasinghe 2018, p. 364.
[106] Wuerth 2012, p. 736.
[107] Watts 1994, p. 82.
[108] Note that there are also some scholars, who think that functional immunity is not even part of international practise as it is. See Lord Goff of Chieveley in Pinochet III 1999.

Even though functional immunity is often seen as an extension to state immunity, it must be noted that when functional immunity links the head of state to the official acts of that state, it is distinctive and separate doctrine of immunity from the doctrine of state immunity. This is shown for example in situations when head of state would have immunity based on functional immunity, but at the same situation the state itself would not have immunity: this is the case with the restrictive approach to state immunity.[109] In some cases, where the act is an official act of state, but is at the same time a commercial act, according to the restrictive approach, a state would not have immunity in this case whereas a former head of state, who has performed the act, would have immunity according to the functional immunity doctrine.

2.5.2.1 Official acts v. private acts

As stated above, functional immunity separates the actions attracting immunity based on nature of the actions. If an act is counted as a private act, it automatically falls outside the scope of functional immunity. Just so that it would not be irrelevant to consider a possible human rights exception to head of state immunity, it must be noted that international crimes and human rights violations can be done in official capacity as well. Thus, when a head of state conducts severe human rights violations even amounting to international crimes, it does not automatically mean that the act could not be considered as an official act and so it would fall outside the scope of functional immunity. This has been stated for example in the Jones v. Kingdom of Saudi Arabia case.[110] The conduct may be – and probably is – a case of abusing public power, but it still remains included to the official functions of a head of state if it has been done in official capacity. However, even if done in official capacity, there may be a human rights exception based on other considerations, when it is more relevant whether an act is actually criminal under international law or not.

Other important thing to note about differentiating actions as official and private is that it makes functional immunity a substantive defence to enforcing jurisdiction and thus, it is not entirely procedural in nature. This is an effective counter argument, when arguing that breaches of *jus cogens* norms cannot affect immunity rules, since they are procedural in

[109] Alebeek 2008, p. 106.
[110] See Jones v. Kingdom of Saudi Arabia 2006, para 76 - 81.

nature.[111] Since functional immunity relates to substantive law, at least procedural nature cannot be considered as justification, why a human rights exception could not be formed in relation to functional immunity.

Both of these aspects will be touched upon later.

3. Defining international crimes and human rights violations

3.1 Core international crimes

International human rights law is a very broad doctrine, including rights from civil and political rights to for example, right to life. For the scope of this thesis, the most serious human rights violations can be considered to be relevant. Thus, the thesis considers immunity in respect of the most serious violations of human rights. These have been divided into two subsections: crimes, that are accepted in international law to be the core international crimes and then other international crimes and serious human rights violations that violate the most fundamental human rights, but do not constitute to these core international crimes.

It is widely accepted that the core international crimes, the crimes that are considered to be the most heinous crimes in international law, are those described in the Rome Statute as well: war crimes, crimes against humanity, genocide and crime of aggression. Since there was no intention of creating new law with the Statute, it is a common view of scholars, that these crimes in the Rome Statute reflect the customary international law.[112] The Rome Statute is not considered here in more detail, because it is the statute that gives jurisdiction to the International Criminal Court (ICC) and is not then applied to head of state immunity issues in national courts, which is the subject of this thesis.[113] These core crimes are introduced here as they can be considered in national level.

After introducing all the violations, the two concepts are being reconciled through examination of state practise and *opinio juris* and it will be considered whether there is a human

---

[111] See Jurisdictional Immunities of the State 2012, para 93.
[112] Kirsch 2003, p. xiii.
[113] Rome Statute is mentioned just for the sake of shortly defining the core crimes in international law. Since these are codified in the Statute and it is reflecting customary international law, it serves as an example of an international statute, where all of these core crimes are mentioned.

rights exception to head of state immunity in foreign national courts in relation to core international crimes and other international crimes and serious human rights violations.

3.1.1 Genocide

Genocide is one of the most heinous international crimes. The prohibition of genocide is codified in the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (the Genocide Convention). According to the article 1 of the Convention "*The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.*" Currently, it has 150 member states.[114] This high number of member states shows strong consensus on punishing people accountable for crimes of genocide. Due to its nature, genocide is often initiated by high-ranking officials, such as heads of state. It would logically follow, that it is a bit controversial if heads of state are accorded immunity, when committing crimes of genocide.

Genocide has existed before its codification to the Genocide Convention, and it has been shown many times after that the crime of genocide also exists outside the Convention in customary international law.[115] It has been noted by the ICJ for example that the Genocide Convention reflects principles of customary international law meaning that whether or not States have ratified the Genocide Convention, they have an obligation to prevent and punish it.[116] In its judgment in Croatia v. Serbia case, the ICJ expressly noted "*the fact that the Convention was intended to confirm obligations that already existed in customary international law*".[117] Before the Convention there was multiple happenings that pushed towards codifying the prohibition of genocide in the form of an international treaty, but the world war II and the Nazi atrocities were the final drop. In the Nuremberg trials regarding the atrocities, the crime of genocide was described the following way: "*genocide, which we say is the extermination of racial and national groups, or, as it has been put in the well-known book of Professor Lemkin, "a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the*

[114] See UN Treaty Collection - Convention on the Prevention and Punishment of the Crime of Genocide, visited on October 15, 2019.
[115] Bruun 1993, p. 216 - 217.
[116] When to Refer Situations as "Genocide" - Guidance Note 1, p. 2.
[117] Application of the Convention on the Prevention and Punishment of the Crime of Genocide 2015, para 95.

groups themselves" ".[118] This statement emphasises the fact, how genocide is actually often committed in official capacity as a part of an organised plan by a state. Important landmark just before the Genocide Convention was the UN General Assembly's resolution 96(1) on December 11, 1946. In this resolution the UN General Assembly already states that "*genocide is a crime under international law*", of which punishment "*is a matter of international concern*".[119] Thus, the title of the decision is "The Crime of Genocide".

As stated earlier, universal jurisdiction is a tool to attack the most heinous of crimes in international law. Even though it is a politically sensitive subject and subject to debate[120], it is widely accepted that genocide is subject to universal jurisdiction.[121] It is true that the article 6 of the Genocide Convention gives jurisdiction to national courts of which territory the crime has happened or competent international tribunal. However, currently the article has been interpreted not to exclude universal jurisdiction.[122] Universal jurisdiction and status as peremptory norm are often considered to be linked to each other. This is true for the prohibition of genocide since genocide is an international crime, which can be prosecuted based on universal jurisdiction and the prohibition of genocide is also part of *jus cogens* norms, peremptory norms, which cannot be derogated.[123] Peremptory norms are the highest norms in international law and they cannot be derogated even by a treaty. This must be taken into account when considering the rules on immunity.

In the Genocide Convention there is only one (explicit) statement regarding possible defences to genocide. In article 4 of the Convention it is stated that "*Persons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals*." Thus, this states that it is irrelevant whether the crime of genocide is committed by a head of state or not, courts that have jurisdiction can try to exercise it over heads of state as well.

It has been stated that this statement should not be confused with the doctrine of head of

[118] Trial of the Major War Criminals before the International Military Tribunal vol 17, 1948, p. 61.
[119] A/RES/96(I), December 11, 1946, p. 189.
[120] Brown 2001, p. 384. See also Damgaard 2008, p. 60 - 61.
[121] Brown 2001, p. 384. See also Fournet 2009, p. 142.
[122] See Adanan 2019, EJIL: Talk!, visited on October 15, 2019.
[123] Fournet 2009, p. 133. See also the article 64 of the Vienna Convention on the Law of Treaties 1969. It states that "*If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates*."

state immunity.[124] Immunity is immunity from jurisdiction as noted earlier. The statement in the Genocide Convention says that heads of state must be punished regardless of whether they are constitutionally responsible rulers. It is hard to see how this statement in the Genocide Convention would not affect immunity in any way, when it is explicitly stated that state officials cannot hide behind their official status.[125] Additionally, with its 150 member states, the consensus to fight against impunity is strong. One can of course state, that this statement still could allow immunity to be accorded in national courts, since there are specific international courts, who can exercise their jurisdiction in the case of state officials. However, as mentioned earlier, because of lack of resources, national courts are needed in the fight against impunity as well – the practise also shows this.[126] Since universal jurisdiction is applicable in relation to genocide, this would also indicate that this irrelevance of official capacity should have relevance in immunity issues no matter the type of the court. It will be studied later how exceptions to head of state immunity have developed in state practise.

3.1.2 Crimes against humanity

Crimes against humanity is one of the four international crimes that are often cited as core crimes. Much like genocide, there had been developments before the world war II, but the heinous crimes done by the Nazi regime during the war and the subsequent Nuremberg trials were really a turning point in this regard.[127] During the war the Allied powers noticed that the atrocities done by the Nazi regime were not prohibited in customary international law.[128] In the Nuremberg Charter article 6(c), crimes against humanity were described as

[124] Schabas 2009, p. 370. Schabas has stated this in relation to the Arrest Warrant case. He notes that even though the official capacity may be irrelevant before international courts this may not be the case before national courts "*that are not entitled to exercise jurisdiction over foreign heads of State*". It must be noted that the subject of the Arrest Warrant case was immunity of incumbent head of state, not former head of state, when the case may be different. Also, this statement is a bit vague, since it does not differentiate between jurisdiction and immunity strictly enough. When interpreting the phrasing of the Genocide Convention, it very much suggests that it has relevance regarding head of state immunity without making any difference between types of courts, since, as shown, genocide is subject to universal jurisdiction (the article 6 is also understood this way). See also the Arrest Warrant case 2002, para 58 - 61.

[125] This has been stated in the Pinochet III 1999 judgment as well. Lord Phillips of Worth Matravers said that the article 3 in the Genocide Convention is an express statement of removal of immunity *ratione materiae.*

[126] For example, in over 20 years that the ICC has been in operation, it has convicted or acquitted only 7 people. See ICC Web Sites - Cases, visited on November 7, 2019.

[127] Before the Nuremberg trials the term "crimes against humanity" was used for the first time in connection with the mass killings of the Armenians in the Ottoman Empire, in 1915. See Cassese 2013, p. 84.

[128] Ibid., p. 86.

"*murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.*"

There is no existing convention covering all the crimes against humanity, which could be applied in national courts, as there is the Genocide Convention. However, it must be noted, that like genocide, also crimes against humanity are part of customary international law.[129] Currently, the ILC is preparing draft articles on crimes against humanity for a future convention on the prevention and punishment of crimes against humanity and the work is still in progress.[130] The draft articles are focused especially on the obligation of prevention.[131]

In May 2019, the Drafting Committee introduced the draft articles as they currently exist. These articles must be taken as an important expression of an opinion of the current state of crimes against humanity, even though they are not yet in force. The formation of the articles has been a long process and has included many rounds of comments by governments and international organizations and reports of the Special Rapporteur.[132] This must be interpreted as a certain level of consensus on the subject. The draft articles contain similar provision as the Genocide Convention regarding the irrelevance of official capacity of the perpetrator. The draft article 6 is stating the view suggested by the Special Rapporteur "*on the irrelevance of a person's official position for purposes of substantive criminal responsibility in the context of allegations of the commission of crimes against humanity*".[133] The draft article 6 states that "*Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal*

[129] Heller 2017, p. 24. See also Cassese 2013, p. 90 - 92. However, there are several multilateral conventions covering at least part of crimes against humanity.

[130] See UN International Law Commission - Crimes Against Humanity, visited on October 15, 2019. See also, Frulli 2018 and Schabas 2018.

[131] Schabas 2018, p. 705. The obligation of prevention is also in the centre of the Genocide Convention.

[132] See UN International Law Commission - Crimes Against Humanity, visited on October 9, 2019.

[133] A/CN.4/SR.3377, August 18, 2017, p. 3 - 4.

responsibility.".[134] More importantly, however, the draft article 7 states on the establishment of national jurisdiction[135] and the article 10 includes also the obligation to prosecute or extradite, *aut dedere aut judicare*.[136] Together these articles would allow a prosecution of a foreign official, who have committed alleged crimes against humanity, when the official is present in the territory of a state trying to prosecute him or her. This is a powerful statement against according immunity to heads of state as well.

Prohibition of crimes against humanity is considered to be part of *jus cogens* norms, the highest norms in international legal order.[137] Like genocide, also crimes against humanity are subject to universal jurisdiction.[138] This means that all states have an interest to prosecute perpetrators committing crimes against humanity and they have the possibility to do so, even if there is no nexus between the crime or the perpetrator with the state asserting jurisdiction.

3.1.3 War crimes

War crimes are set of crimes of which there is no existing authoritative list of conduct that can amount to war crimes.[139] In short, war crimes are violations of international humanitarian law.[140] At the core of international humanitarian law there are the four Geneva Conventions 1949 and two additional protocols 1977.[141] War crimes can be divided into two categories: crimes conducted in international armed conflicts between two states or in internal conflicts where the hostilities are large-scale inside one state.[142]

War crimes, both international and internal, include objective and subjective elements. Objective elements include crimes committed to persons not taking part to armed hostilities, crimes committed by resorting to prohibited methods of warfare or prohibited means of warfare, crimes against specially protected persons, crimes consisting of improperly using

---

[134] A/CN.4/L.935, May 15, 2019, p. 4.
[135] Ibid., p. 4.
[136] Ibid., p. 5.
[137] See for example Dixon 2013, p. 41, Mack 2015, p. 73 - 74 and Bassiouni 2013, p. 158.
[138] See Luban 2004, p. 91, Boed 2000, p. 305 and Damgaard 2008, p. 60. As noted, also the draft article 10 includes prosecute or extradite rule, which can be interpreted to reflect the idea of universal jurisdiction.
[139] Cassese 2013, p. 70.
[140] Cryer 2018, p. 752.
[141] See What is international humanitarian law? by ICRC. It must be noted that there is also a third additional protocol 2005 existing, but it has a very specific area of application.
[142] Shaw 2008, p. 435. It can be noted that regulation in relation to internal armed conflicts is a lot lesser than in relation to international armed conflicts.

protected signs and emblems and conspiring or enlisting children under the age of 15 years.[143] Subjective element means that criminal intent is needed: in some cases of war crimes it means clear intent, but in some cases only recklessness or even gross negligence is enough.[144] War crimes also need a link to an armed conflict,[145] which is their most distinctive difference to crimes against humanity.[146]

War crimes do not have similar separate convention as the Genocide Convention or the draft articles on crimes against immunity, thus for example there is no explicit provision taking a stance on the irrelevance of official capacity[147], but the official capacity is considered to be irrelevant in the case of war crimes as well in the sense that the intention of war crimes is to capture the conduct of those acting in official capacity as state officials. Thus, official capacity is not a defence to war crimes either. In international armed conflicts the parties to the conflicts are states and because states act through their officials and war crimes can only be committed when there is a nexus to the armed conflict, the officials are necessarily conducting official state acts when participating to the armed conflicts and when conducting possible war crimes.[148]

It must be noted that war crimes are also subject to universal jurisdiction.[149] In case of internal armed conflicts one party is a state and another is a non-state actor and since war crimes can be brought to court based on universal jurisdiction, this allows jurisdiction over these crimes committed as official as well as private acts, and in addition, it would be illogical to assume that jurisdiction could be established over the private party, but not the state party. Thus, it can be argued that in case of war crimes, it is also irrelevant whether they are committed in official capacity or not: a matter that could have effects on immunity as noted earlier. If the aim is to capture also the officials committing war crimes, which are often initiated by high-ranking officials such as heads of state, would it be consistent to accord immunity after committing such crimes?

---

[143] Cassese 2013, p. 71 - 75.
[144] Ibid., p. 75 - 76.
[145] See Bassiouni 2013, p. 200. The armed conflict context is still important, even though rigid distinction is currently going through erosion. However, this context may determine whether a certain use of a weapon is deemed as an international war crime or not.
[146] Shaw 2008, p. 438.
[147] Frulli 2018, p. 778.
[148] Akande & Shah 2011, p. 843 - 844.
[149] Ibid., p. 844. Universal jurisdiction is established by the Geneva Conventions as well as customary international law.

The prohibition of war crimes is considered to be part of *jus cogens* norms as well.[150] Thus, it cannot be derogated by a treaty. It must be noted, that even so, a treaty which provides for head of state immunity is not void per se, since it does not deny the jurisdiction over war crimes, but it's just regulating on the enforcement of the obligation of complying with the peremptory norms. However, in this case one can argue that when perpetrators are not punished and victims do not get any redress, a provision that would allow immunity to be accorded to heads of state in case of international crimes, would hinder *de facto* materialization of the human rights of the victims and actually would leave universal jurisdiction essentially meaningless.

3.1.4 Crime of aggression

Crime of aggression is the last of the core international crimes mentioned in the Rome Statute, which is considered to reflect customary international law. Rome Statute's definition of crime of aggression was only reached in 2010 in Kampala, and not in the original negotiations of the Statute.[151] The article 8 bis of the Statute thus defines crime of aggression as "*the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*".

However, it must be noted that the crime of aggression is a bit different from the other three core crimes. As said, the Rome Statute should reflect customary international law, since the negotiators did not want to go beyond the established law.[152] However, there is no consensus on that, whether the definition of crime of aggression is actually reflecting customary international law. This does not mean that the crime of aggression would not be part of customary international law,[153] but just that its definition may be different in customary international law than it is currently in the Rome Statute. The issue is that, unlike with the other three core crimes, there is only little development with the definition of crime of aggression after the world war II.[154] However, there are several reasons due to

[150] Dixon 2013, p. 41.
[151] Grover 2017, p. 375.
[152] Wrange 2017, p. 711.
[153] Kress 2007, p. 853.
[154] Grover 2017, p. 387.

which it is hard to argue that the definition in the above-mentioned article of the Rome Statute would not reflect its customary law counterpart pretty closely. For example, the Special working Group on the Crime of Aggression, which was the team established to solve the issues around the crime of aggression of the Rome Statute wanted the definition of crime of aggression to fit seamlessly into the Rome Statute, which was drafted with a view of departing as little as necessary from the existing custom.[155] If the article 8 bis is being compared to the Nuremberg and Tokyo Charters, which were the Charters established to prosecute Nazi and Japanese officials for crimes during world war II, and the Control Council Law No. 10, which was established to capture other than the major criminals which were covered by the Charters, it can be noted that the definitions of the individual acts of aggression are very much alike.[156] On the other hand, the state act of aggression is based on the 1974 General Assembly resolution no 3314.[157] As these are the main written reflections of state practice and *opinio juris* on the subject, it is difficult to argue that the Special Working Group was not interested in aligning the definition of the crime and state act of aggression in the Rome Statute with their counterparts under customary international law.[158] Thus, it can be stated that these above-mentioned precedents are in the core of the definition of crime of aggression and these core definitions at least reflect customary international law.[159] This is important to establish due to the lack of explicit convention on the crime of aggression of which the national courts could apply.

Thus, the crime of aggression is a so-called leadership crime - also according to customary international law, as established above. This is how it also differs from the three other core crimes.[160] Basically this means that compared to the other atrocity crimes, only political and military leaders of a state can commit acts of aggression. This would include heads of state. Other core crimes can be committed by lower officials or even by non-state actors. Thus, the crime of aggression is always committed by the highest of state actors and thus the act is always an official act.

[155] Barriga 2012, p. 18. See also Grover 2017, p. 387.
[156] See the Nuremberg Charter 1945, article 6,
the Tokyo Charter 1946, article 5 and the Control Council Law no. 10 1945, article 2.
[157] A/RES/3314(XXIX), December 14, 1974, p. 143 - 144.
[158] Grover 2017, p. 388.
[159] Wrange 2017, p. 711.
[160] Ruys 2017, p. 19.

The prohibition of crime of aggression is part of *jus cogens* norms.[161] Some scholars have made generalizations that all *jus cogens* norms are also subject to universal jurisdiction. However, there is no universal jurisdiction what comes to crime of aggression.[162] Thus, one cannot derive a rule regarding universal jurisdiction from *jus cogens* status of a norm. It must be noted that as discussed in the chapter 2.1 covering jurisdiction, there are other means how a state can prosecute nationals of a foreign state than universal jurisdiction. Thus, some of the general principles of jurisdiction could allow prosecution over the crime of aggression by national courts as well. However, the domestic exercise of jurisdiction over the crime of aggression is controversial for other reasons.[163]

Is there national jurisdiction at all over the crime of aggression? This is relevant regarding the immunity question, since immunity is immunity from jurisdiction. For example, the ILC has noted that there is no state practise supporting the right of national courts to prosecute leaders of foreign states over the crime of aggression.[164] The problem here would be that, unlike with the other three core crimes, a state wanting to exercise jurisdiction over another state should do a prior finding of the accused state's breach of international law. This is the reason why engaging with domestic prosecutions by a state over another state's head in the case of crime of aggression is problematic: in some cases, use of force is legal. The determination whether the use of force is legal or whether it is considered to be an illegal act of aggression is done by the Security Council, who has the authority to do so. This authority is given to the Security Council in the UN Charter, since the very purpose of the UN is provided in the Charter: to maintain international peace and security.[165] Thus, it would be challenging, if then states would exercise this power, when it is specially given to the Security Council.

However, if it is accepted, as established above, that the crime of aggression exists in customary international law as it is in the Rome Statute – or at least how it is in the precedents

---

[161] Crawford 2002, p. 188, para 5.

[162] Akande & Shah 2011, p. 836.

[163] See for example RC/Res.6, June 11, 2010, Annex III, p. 22. Even though the resolution itself considers the crime of aggression in the Rome Statute it states regarding jurisdiction of national courts as well: "*It is understood that the 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*." See also Ruys 2017, p. 19.

[164] Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries 1996, p. 30.

[165] See the United Nations Charter 1945, article 39. The article states that "*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security*."

of the Rome Statute (the Nuremberg Charter, the Tokyo Charter and the Control Council Law no. 10), in principle it could be possible to exercise domestic jurisdiction over the crime of aggression.[166] At the current moment, it seems that this remains mostly a theoretical question. However, to some extent it has been accepted that establishing national jurisdiction over the crime of aggression is possible, although not yet widely exercised.[167] When national jurisdiction would be exercised over the crime of aggression, it is probable that immunity questions arose.

3.2 Other international crimes and serious human rights violations

The above-mentioned crimes are the core international crimes. These are separated from the other international crimes and serious human rights violations for the sake of clarity, since these four can be considered to be the most heinous crimes of mankind. They also have many features in common, as demonstrated.

There is also other kind of conduct that is relevant to ponder here in relation to a human rights exception to immunity. As mentioned, the ILC is in the process of drafting articles on immunity of state officials from foreign criminal jurisdiction.[168] Special Rapporteur Escobar Hernandez proposed in her fifth report a draft article 7 in which she proposes that "*Immunity shall not apply in relation to the following crimes: (i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances*".[169] The current form of the provisionally adopted draft article 7 is a bit more detailed: "*Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance*."[170] Although the draft articles are not yet in force, they are a very current expression of opinion of the international community

---

[166] This may vary from country to country, how this is interpreted to be part of their national application of customary international law, but it might be possible. This is of course also subject to sufficient precision of the customary rule on the crime of aggression. It must be also noted, that several states have criminalized the crime of aggression in their national criminal law.

[167] Cassese 2013, p. 142 - 145. See also R. v. Jones et al. 2006. In the case the House of Lords concluded that the crime of aggression is part of customary international law and thus, at least in a broad sense, part of English law.

[168] See the whole process from UN International Law Commission - Immunity of State Officials from Foreign Criminal Jurisdiction, visited on October 16, 2019.

[169] A/CN.4/701, June 14, 2016, p. 99.

[170] A/CN.4/729, April 18, 2019, p. 70.

in relation to head of state immunity from foreign criminal jurisdiction.[171] For this reason, the below international crimes are included here.[172] It can be noticed that the crime of aggression is not included in the draft article, probably because of its controversial application in domestic courts. It is included in the thesis, however, because of its status as one of the core international crimes.

Regarding immunity *ratione personae* the draft article 4 plainly states "*Such immunity ratione personae covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.*" There are no exceptions mentioned.

3.2.1 Torture

Torture is an international crime that exists both in customary international law and in a form of several treaties, which national courts can apply.[173] The definition of torture is also changing between these treaties, but for the present purpose, the definition in the Torture Convention must be regarded as authoritative, since it is the convention the national cases being introduced are applying and since it has been noted to reflect the definition in customary international law.[174] In addition, the Torture Convention is extremely widely accepted with 168 member states. Before, torture was only a crime in the context of war, but currently it is an international crime, whenever committed.[175] As for all the core international crimes introduced, the crime of torture was also accepted to the illustrative list of serious crimes under international law in Princeton 2001.[176]

It must be noted that torture can be also part of war crimes and crimes against humanity. Here however, torture is 'only' the crime of torture as a separate crime. The Torture Convention is obligating state parties to implement torture as a separate crime, autonomous

[171] This is now even more recent expression of opinion than the United Nations Immunities Convention 2004. Even though there is an existing final draft of this Convention, it is not yet in force and its primary focus is state immunity whereas the focus in the draft articles is state official immunity.
[172] There are different opinions of which are counted as international crimes. For the current purpose, the list included in the draft article 7 by the ILC serves well.
[173] Bassiouni 2013, p. 203. There are many more treaties covering torture in addition to the Torture Convention, which is only being the most widely accepted convention.
[174] van der Vyver, Johan D 2003, p. 432.
[175] Bassiouni 2013, p. 203.
[176] The Princeton Principles on Universal Jurisdiction 2001, p. 29, principle 2.

from the other crimes, in which it can be also included. This way, the Torture Convention requires the state parties to establish domestic criminal jurisdiction over the offence.[177]

Much like the crime of aggression, article 1 of the Torture Convention states that it must be done by someone acting in official capacity, more specifically it must be "*inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*". There is no specific article regarding irrelevance of official capacity for obvious reasons, since the defendants in torture cases must be state officials; the people punished must have committed the acts in some sort of official capacity. It can be criticised, why the Torture Convention explicitly requires torture to be committed by someone acting in official capacity. What comes to violation of human rights, torture is a human rights violation regardless whether it has been committed by official or by private individual. As such, it need not be committed by a state official, such as a head of state. However, for the purposes of the issue at hand, it is important, that it can be committed in official capacity as well – and according to the Torture Convention, it actually must be committed in a such capacity.

Additionally, the article 7 of the Convention states that "*The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution*." This extradite or prosecute obligation is providing universal jurisdiction over the offence: each country is obliged to either take the matter further in their own courts or extradite the alleged offender to a country that will.[178] Prohibition of torture is also a *jus cogens* norm and it cannot be derogated.

3.2.2 Enforced disappearances

The prohibition of enforced disappearances is part of customary international law.[179] Like torture, it can also be part of war crimes or crimes against humanity, but it can be taken as

[177] Gaeta 2008, p. 187.

[178] The universal jurisdiction provided in the Torture Convention requires the offender to be in the territory of a state, thus proceedings *in absentia* based on universal jurisdiction are not established by the Convention.

[179] This has been established for example in the Rule 98 of Customary International Law by ICRC. See also Sarkin 2012, p. 540.

a separate crime as well. It has been prohibited through multiple legislative tools[180] in the past, of which the most notable is the United Nations International Convention for the Protection of All Persons from Enforced Disappearance 2007 (the Enforced Disappearance Convention).

In the Enforced Disappearance Convention, in article 2, it is stated that "*enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law*." Thus, the definition of the crime in the Convention includes that, there must be an involvement by state agents in order for it to be enforced disappearance.[181] This is a similarity to the Torture Convention.

The Enforced Disappearance Convention was really a revolutionary convention, because in addition to the fact that it has created an autonomous international crime, it has also established universally agreed definition, which was still lacking before the Convention. In his report to the Council of Europe's Parliamentary Assembly in 2005, the rapporteur Mr. Christos Pourgourides stated that "*The description of the existing legal framework shows that a universally recognised definition of enforced disappearance is still lacking. The disputed issues include that of the responsibility for non-State actors, the requirement of a subjective element in the definition, and the concept of the right not to be subjected to enforced disappearance in terms of the specific human right(s) violated by such an act.*"[182] It can be noted that the current definition in the Enforced Disappearances Convention does not still take into account the acts of non-state actors, such as guerrilla groups, but for our present purposes it is not an issue. However, this definition has been stated to be universally agreed and binding.[183]

In addition to that that enforced disappearances exist also in customary international law, it has been stated that enforced disappearance has acquired the status of *jus cogens*

---

[180] See Rule 98 of Customary International Law by ICRC.
[181] This is important, because without this element it cannot be considered as enforced disappearance, but just certain kind of abduction of a person by private individuals. See Scovazzi & Citroni 2007, p. 272.
[182] Enforced Disappearances, Report to the Committee on Legal Affairs and Human Rights 2005, para 45.
[183] Scovazzi & Citroni 2007, p. 267.

norm.[184] This may have not always been the situation, but the Convention has been important in the matter among other state practise and *opinio juris*. Although the Convention has only been ratified by 62 state parties[185], the number has almost doubled in the last seven years and from all of the states drafting the Convention none objected that enforced disappearances should be prohibited in international law.[186]

As per others, the Enforced Disappearance Convention also includes the extradite or prosecute provision establishing universal jurisdiction over the crime. Compared to universal jurisdiction existing in customary international law[187], the prosecute or extradite provision in the Convention is not only permitting a state to exercise jurisdiction over the crime of enforced disappearance, but it is actually obliging to do so. If a state considers that its courts are unable to prosecute the person for some reason, it must extradite the alleged perpetrator to a state, which will.

3.2.3 Crime of apartheid

The crime of apartheid has its origins in South Africa and its long history of systematic and legalized segregation. In 1973, the UN General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid (the Apartheid Convention). It has quite a broad definition of the crime of apartheid, which includes "*denial to a member or members of a racial group or groups of the right to life and liberty of person*" and other policies similar to the segregation practised in southern Africa. The Convention states that international criminal responsibility will be bore by all the individuals and organization committing the crime, including representatives of a state. Thus, the crime of apartheid is attracting irrelevance of official capacity, which means that also the high-ranking officials, such as heads of state, should be held responsible.

All the member states to the Apartheid Convention are also obligated to prosecute the offenders whether or not they reside in the territory of a state or whether or not they are

[184] Sarkin 2012, p. 582.
[185] UN Treaty Collection - Convention for the Protection of All Persons from Enforced Disappearance, visited on October 31, 2019.
[186] Sarkin 2012, p. 577 - 578. By April 2012, there were only 32 states that had ratified the Enforced Disappearance Convention.
[187] It must be noted that many of these conventions on international crimes oblige states to use universal jurisdiction whereas customary international law is often considered to 'only' allow it. See Basic Facts on Universal Jurisdiction 2009, visited on October 11, 2019.

nationals of a state trying to prosecute them. Thus, the crime of apartheid is also subject to universal jurisdiction.[188]

The prohibition of apartheid has a status as a *jus cogens* norm.[189] This has been stated for example by the ILC in 2001, when they submitted their report from their fifty-third session containing the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. In the report the ILC stated that, among others, in relation to crime of apartheid "*There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference*."[190] Thus, there are no exceptions to the prohibition of crime of apartheid.

Article 1 of the Apartheid Convention notes that apartheid is a crime against humanity, which it obviously is, in the narrow and the broad sense. The crime of apartheid is most often counted as a part of crimes against humanity, since there is no full and comprehensive list of them. However, it also exists as its own, autonomous crime, as it can be seen for example from the draft article 7 on immunity of state officials by the ILC.

It must be noted that crime of apartheid is a bit different compared to the other crimes introduced due to its specific temporal nature in history. The reason for the establishment of the Apartheid Convention was the situation in southern Africa. The reason why the crime of apartheid is introduced here is that the ILC has considered it to be one of the crimes, which would lead to lifting of immunity *ratione materiae.* Addition to that, it must be noted that the crime of apartheid is one of the most heinous crimes in human history and can happen again. That is the reason why the Apartheid Convention is a general convention prohibiting apartheid and does not relate only to the segregation that happened in southern Africa. Additionally, state involvement in this crime is maybe the most prominent from all of the crimes introduced. In order for the crime of apartheid to happen, a system and acceptance by the state and its highest officials is almost a must. Due to its special nature, there is no prominent current cases relating to head of state immunity and the crime of apartheid, thus at the moment, it will remain as a question of the nature of the act. Would

[188] Ibid.

[189] See for example Parker 1989, p. 439. This development towards the status of a peremptory norm has already started virtually since 1948 from South Africa.

[190] Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, p. 112.

there be an exception to head of state immunity due to its features as an international crime breaching *jus cogens* prohibition and attracting universal jurisdiction?

3.2.4 Other serious human rights violations

There are many violations of human rights, which do not amount to international crimes. However, the aim of the thesis is to study whether an exception to head of state immunity exists in relation to international crimes, but also could it include violations of human rights law, which do not amount to international crimes. Many violations of these fundamental human rights are covered by the above-mentioned international crimes, but there are violations that for some reason or other are not counted as international crimes. The reason why it is studied whether the scope of a human rights exception here could also include the violations that do not amount to international crimes is that often the most heinous and wide-spread violations of human rights are somehow initiated by the most high-ranking officials, such as heads of state.

The core human rights are rights that cannot be derogated.[191] At least human rights protecting 'life, limb and liberty' are considered to be such human rights. Thus, for example murder and arbitrary detention are not allowed in any circumstances. This list includes also the right not to be subject to slavery or serfdom, the right to be free from torture or other cruel, inhumane, or degrading treatment, the right to not be deprived of life in an extrajudicial or arbitrary manner, and some fundamental fair trial guarantees.[192] It can be seen that many of these can be found from the core international crimes. However, it is also important to note that these are protected by many other international human rights conventions and are included in the core human rights even if they would not be found in the core international crimes in some form.[193] International crimes and other serious human rights violations are thus intertwined.

It must be noted that protecting human rights is in the current world a matter of priority for the international community.[194] It is thought that states have obligation towards their

[191] Bröhmer 1997, p. 147.
[192] Pérez-León Acevedo 2017, p. 151.
[193] See for example International Covenant on Civil and Political Rights 1966, American Convention on Human Rights 1969 and European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.
[194] Alebeek 2008, p. 301.

citizens to protect and respect their human rights. Generally, it is believed that even though notion of sovereignty and self-determination are very deeply rooted principles in international law, even these principles do not authorize the state and its officials to treat the citizens however they can without outside interference. Even so, it must be studied through state practise and *opinio juris*, whether or not a human rights exception exists in customary international law and what is the scope of such an exception. Does it cover maybe only some or all of the international crimes or are other serious human rights violations included as well?

4. Reconciling head of state immunity with international crimes and other serious human rights violations: Human rights exception

4.1 Human rights exception theories

There are several theories on how a human rights exception can be formed. Some of these theories are used to argue on behalf of a human rights exception in the state practise, that is introduced later, but these theories are also used to argue on behalf of a human rights exception as they are, without strong enough back up from state practise and *opinio juris*. Just for this reason, these theories have weaknesses, but they are flawed in other ways as well. This is the reason, why a true exception based on state practise and *opinio juris* – if it exists – lasts review the most.

First, there are three general theories which are introduced shortly, after which an exception based on customary international law is examined thoroughly.

One of the theories is a theory based on categorizing the acts that violate *jus cogens* norms. The idea of the theory is that the acts that violate *jus cogens* norms, cannot be official acts.[195] This theory plays with the categorization of the acts in *ratione materiae*, which is that functional immunity protects former heads of state only in relation to official acts. However, this reasoning is flawed. As showed in the chapter 3, all of the core international crimes as well as other serious human rights violations are done either necessarily or at least often by state officials as part of their official functions. For example, if torture must

[195] Akande & Shah 2011, p. 828.

be an official act in order for it to be torture defined in the Torture Convention, it cannot in any way fall under this theory. This theory hasn't got a lot of support from the scholars.[196]

Other theory is the implied waiver theory. This means that heads of state should understand, that when they are violating *jus cogens* norms, they are waiving their immunity by implication.[197] This is an odd construction for that when heads of state are violating peremptory norms, they are not at the same time willing to subject their conduct under the scrutiny of other national courts. Since immunity is a construction provided by international law, to which heads of state are in general entitled to, an implied waiver would be a wrong tool to get a consent to give up immunity, when this consent is not actually given.

The third theory shortly introduced here is the normative hierarchy theory. According to this theory, when a head of state is violating human rights, which are considered as *jus cogens*, immunity should be lifted in these cases, because rules of immunity rank lower, not being peremptory norms.[198] Problem with this theory is that it is hard to rigidly define, which acts are actually included in the peremptory norm category and which are not. Additionally, it can be argued that this hierarchy of norms theory leads to a conclusion that a norm having a *jus cogens* character would automatically attract universal jurisdiction, since a breach of this norm would lift immunity. This can lead to an assumption that, when immunity is in a such a conflict with *jus cogens* norms, the third states would actually have an obligation to prosecute.[199] This is not true as noted before for example in relation to the crime of aggression, which is having a *jus cogens* character, but does not attract universal jurisdiction. Additionally, although the other international crimes introduced attract universal jurisdiction, there is only an *obligation* to prosecute for some of them, whereas there is a *right* to prosecute for all of them.

4.2 Exception based on customary international law: state practise and *opinio juris*

All of the above theories are just a way to say that immunity should not be accorded, when

[196] See Jones v. Kingdom of Saudi Arabia 2006, para 84. Lord Hoffman notes that "*The notion that acts contrary to jus cogens cannot be official acts has not been well received by eminent writers on international law.*"
[197] Bröhmer 1997, p. 190 - 191.
[198] Caplan 2003, p. 741 - 742.
[199] Akande & Shah 2011, p. 834 - 836.

there are international crimes or violation of human rights severe enough committed. However, this exception to immunity should be established through customary international law, since this issue is not (yet) covered by treaty law.[200] Thus, this chapter is studying whether there is a human rights exception to head of state immunity through state practise and *opinio juris*.[201]

State practise consist of many different aspects, of which many are not publicly available.[202] State practise includes e.g. national court cases and domestic legislation, which are introduced here.[203] The cases and evidence on state practise are presented in a manner, which also takes into consideration the most prominent judgments of international courts on these issues, since the arguments of international courts are important notions on the condition of customary international law.

Alongside state practise, *opinio juris* is needed in order for a customary rule to be formed. *Opinio juris* represents the obligatory element of customary international law, meaning that states acknowledge certain practise as obligatory and that the practise is required by international law.[204] This sense of obligation differentiates customary international law from a practise exercised because of fairness or morality. State practise and *opinio juris* cannot be separated rigidly,[205] thus matters presented here may as well serve as examples of both,[206] since currently words can be treated as action and rarely judgments are done without a statement regarding *opinio juris.*[207]

Thus, *opinio juris* and state practise which are represented here include judgments by national and international courts, national legislation and other legal instruments, such as the work of the ILC and multilateral treaties, which are representing the opinion of their mem-

[200] See UN International Law Commission - Immunity of State Officials from Foreign Criminal Jurisdiction. The work of the ILC has started already on 2006, but it is not yet finished. This is one of the reasons, why this question on head of state immunity and human rights exception stays current.
[201] It was established for example in the North Sea Continental Shelf 1969 case by the ICJ that these are the ingredients of an existing rule of customary international law.
[202] Wood & Sender 2017, Max Planck Encyclopaedias of International Law, para 21.
[203] Wuerth 2012a, p. 3.
[204] Brownlie 2008, p. 8.
[205] Wood & Sender 2017, Max Planck Encyclopaedias of International Law, para 1. To put it simply, state practise includes actions whereas *opinio juris* includes statements. However, often both of these are included, when a state is expressing their opinion on a legal matter.
[206] Jurisdictional Immunities of the State 2012, para 77.
[207] See Military and Paramilitary Activities in and against Nicaragua 1986. In paragraph 186 the ICJ states that not a complete consistency of practise is needed for a customary rule to be established.

ber states.

First, the case, which was the inspiration for the thesis – Pinochet III – is explained in more detail following other relevant court cases in the subject. The cases are divided into categories based on which aspects of immunity they touch upon and what are their conclusions.

4.2.1 Court Cases

The Pinochet III case

The Pinochet III case refers to a court case by the United Kingdom's House of Lords having official name of Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3) (Pinochet III). The proceedings started from an international arrest warrant issued by a Spanish judge in 1998 in order to get the former Chilean president Augusto Pinochet Ugarte to face proceedings on alleged crimes committed during his presidency, including torture.[208] Pinochet was the president of Chile during the years of 1974 - 1990.

Due to the international arrest warrant, the UK's authorities arrested Pinochet, while he was travelling to the UK for personal reasons. The arrestment was done with a view to extradite him to Spain, which Pinochet contested by applying to get the arrest warrant supressed. He stated that as a former head of state he would enjoy immunity from the proceedings. The first judgment in the Pinochet proceedings was given on October 28, 1998. The UK's High Court of Justice decided that Pinochet was granted immunity from criminal proceedings based on the UK's State Immunity Act 1978. However, the Spanish judge had issued second international arrest warrant and this warrant had left a pending appeal to the House of Lords.

The first judgment in the House of Lords was given on November 25, 1998. The House of Lords decided that Pinochet was not entitled to immunity in criminal proceedings. However, Lord Hoffmann had failed to inform his links to one of the interveners in the case, Amnesty International. At the time, Lord Hoffman was the chairman of Amnesty International Charity Limited, the fund-raising arm of Amnesty International. Consequently, on Pinochet's petition, the judgment of November 25, 1998, was set aside by another decision and Pinochet's was once again entitled to another hearing on his original immunity claim.

[208] Pinochet III 1999 – ICD Summary, visited on November 8, 2019.

Finally, the House of Lords gave its final decision in the case. The judgment given on March 24, 1999, held that Pinochet was not entitled to immunity in criminal proceedings in relation to acts of torture.[209] The House of Lords was basing the decision on the section 134 of the Criminal Justice Act 1988, which was based on the Torture Convention, which UK ratified in 1988. Since the Torture Convention and the section 134 of the Criminal Justice Act 1988 based on the Convention came into force in the UK only in 1988, this limited the alleged acts committed by Pinochet that could be taken into consideration in the proceedings. Even though Pinochet and his regime had done heinous violations of human rights before 1988 as well, these could not be taken into consideration in the proceedings. Also, some of the crimes were not extraditable crimes, thus they could not be taken into consideration either.

The House of Lords composed of seven lords, from which six were in the opinion that Pinochet was not entitled to immunity. However, the reasoning varied between the lords. Since the case is a landmark case in the field of head of state immunity, the arguments presented by the lords are being examined here in more detail. However, the end result supports some kind of a human rights exception at least to functional head of state immunity in foreign criminal proceedings in relation to acts of torture.

Lord Browne-Wilkinson thought that Pinochet would not be entitled to immunity from the jurisdiction. His reasoning was based on the Torture Convention and its obligations to its member states. The Torture Convention was the basis for the UK's section 134 of the Criminal Justice Act 1988. Lord Browne-Wilkinson argued that the universal criminal liability created by the Torture Convention was inconsistent with immunity *ratione materiae.* Additionally, he did argue that, if functional immunity would be granted in a situation like this, this would lead to odd results. He argues that "*if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results*".[210] He refers to the requirement that act should be official according to definition in the Torture Convention. He further argues that if this would be the case, immunity would follow. This reasoning can be interpreted in a way that Lord Browne-Wilkinson is arguing that torture cannot be an official act, which is controversial since it must be in order to fit in the definition of the Convention. In any case, Lord Browne-Wilkinson argues that affording

[209] Pinochet III 1999.
[210] Ibid., p. 18.

functional immunity in this matter would be inconsistent with the provisions of the Torture Convention and thus, in this case, foreign court may establish jurisdiction.[211]

Lord Goff of Chieveley was the only one, who did think that Pinochet would be entitled to functional immunity as a former head of Chile. He based his main argument also to the Torture Convention. He thought, that since the Torture Convention did not expressly lift immunity, it could do so by implication. He explored this option but concluded that this implied waiver of immunity is not clear enough, thus there is no waiver of immunity and Pinochet was entitled to it.

Lord Hope of Craighead introduces two exception to immunity, which he thinks are included in customary international law. The first one is that, if a head of state does something under official colour, but does it for their own benefit or pleasure, then functional immunity would not be afforded for these acts. The second exception relates to acts, which violate the norms that have acquired the status of *jus cogens* under international law. The second exception was his reasoning, why Pinochet was not entitled to immunity. He did not think that a waiver nor an implied term of the Torture Convention would apply in this case.

For his part, Lord Hutton defended the denying of immunity by saying that acts of torture cannot be regarded as functions of a head of state. He bases his argument on the Torture Convention. Thus, Lord Hutton argues that the act of torture cannot be regarded as a function of a state, since international law clearly prohibits it as an international crime. He also argues that there is no inconsistency for entitlement of immunity claim in civil proceedings and lack of entitlement of immunity claim in criminal proceedings against Pinochet. As stated earlier, though, torture must be done in official capacity, thus an exception must be reached through other means.

As many others, Lord Saville of Newdigate noted that incumbent heads of state enjoy immunity despite the nature of the act. As for the functional immunity, he noted that it is the express terms of the Torture Convention that have removed or waived the possibility of immunity *ratione materiae* in relation to acts of torture. He argues that since the Torture Convention provides for the rule of prosecute or extradite, the state parties to the

[211] See also Demjanjuk v. Petrovsky 1985 and Israel v. Eichmann 1962.

Convention has now agreed that each party can establish its jurisdiction over alleged torturers from other state parties. He emphasises that since torture must be an official act in order to be in the scope of the Torture Convention, immunity based on official activity cannot co-exists at the same time with the obligations member states have based on the Convention.

Compared to Lord Saville of Newdigate, Lord Millet argues on behalf of an exception to immunity a bit differently. He thinks, that in this case, it cannot be considered that there would have been a waiver of immunity, since it is not express and actually, there is no immunity to be waived. However, he also argues that the way torture is defined in the Torture Convention and section 134 of the Criminal Justice Act, it is impossible how immunity *ratione materiae* can co-exist with an act of torture based on this definition. Lord Millet also acknowledges that this impossibility is based on the requirement that the offence can be committed only by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It would be irrational, that immunity would follow. Additionally, he bases his arguments to quite thorough review of state practise and *opinio juris* since world war II and refers to for example cases tried in national courts after the war, such as the Eichmann case, where the jurisdiction of these courts was never questioned. Lord Millet states that, if immunity would be granted in the case, "*section 134 would be a dead letter*".[212] Through the Torture Convention "*The international community had created an offence for which immunity ratione materiae could not possibly be available.*"[213] He also argues, that Torture Convention did not create a new international crime, but it reaffirmed it and additionally, whereas previously states were entitled to exercise jurisdiction in respect of the offence wherever it was committed, they were now placed under an obligation to do so. He also concluded that in the future, if a person commits atrocities that breach fundamental human rights of international law, they should be called to account.

Lord Phillips of Worth Matravers also thought that *ratione materiae* is not available in the case. It can be said that he is the only one that expressly argues that the lack of immunity in the case is based on an exception related to conduct that amounts to an international crime. He is giving an example in the form of the Genocide Convention by arguing that even

[212] Pinochet III 1999, p. 92.
[213] Ibid., p. 92.

though the Genocide Convention explicitly states, in his opinion, that when a person has committed genocide, then functional immunity cannot be granted[214], this is not needed in relation to international crimes. He is in the opinion that no established rule of international law requires immunity *ratione materiae* to be given, when international crimes are in question. He also argues that international crimes establish universal jurisdiction and once this jurisdiction is established, it should not matter whether the action is done in official capacity by a former head of state, immunity is still not accorded. Additionally, he notes that since world war II it has been acknowledged, that there are crimes that "*shock the consciousness of mankind and cannot be tolerated by the international community*".[215]

4.2.1.1 Cases supporting a human rights exception

The Belgium international arrest warrant

The Belgium international arrest warrant was a domestic matter, which eventually was taken to the ICJ and the arguments of the ICJ are being studied later as an indication of state of customary international law.

The background for the case was that a Belgium judge Damien Vandermeersch issued an international arrest warrant on Abdulaye Yerodia Ndombasi on April 11, 2000.[216] At the time Yerodia was the Minister for Foreign Affairs in Democratic Republic of Congo. The arrest warrant was based on universal jurisdiction, which was codified in Belgian law, which allowed Belgian courts to exercise jurisdiction on grave violations of international humanitarian law. The alleged actions done by Yerodia were breaches of the Geneva Conventions 1949 and crimes against humanity. Congo contested the arrest warrant on the basis that the arrest warrant was violating norms of international law regarding immunity and sovereign equality. Basically, the question Congo raised in the ICJ[217] was "*Did the issue and circulation of an arrest warrant by a Belgian judge against a person who was at the time the Congolese Foreign Minister, but who no longer holds government office, violate his immun-*

[214] The Genocide Convention 1948 states that "*Persons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals*."
[215] Pinochet III 1999, p. 103.
[216] Bekker 2002.
[217] By the time the ICJ gave its decision on February 14, 2002, Yerodia had ceased to be the Minister for Foreign Affairs.

ity from criminal process and make the arrest warrant unlawful under international law?"[218]

Thus, this matter taken as evidence of state practise would state that Belgium's stance on immunity rules was that even an incumbent high-ranking state official, which can be equated with head of state, did not enjoy immunity for international crimes. This was codified in Belgian law as well, since it did not recognise official capacity as basis for immunity in relation to international crimes.[219]

After the judgment by the ICJ the Belgian courts cancelled the proceedings against Yerodia claiming that there were jurisdictional issues, thus immunity questions were not considered again in that stage.[220]

Prosecutor-General of the Supreme Court v. Desiré Bouterse

Desiré Bouterse was the head of Surinam army, when 15 political opponents were arrested, tortured and executed by army soldiers due to the orders of Bouterse as the military leader.[221] 14 of the victims were Surinam citizens and one of them was a Dutch. The criminal proceedings in the Dutch Court of Appeal in Amsterdam against Bouterse were ordered to be initiated on November 20, 2000 based on universal jurisdiction for human rights violations committed (acts of torture).

The Court denied functional immunity in the case. It did not consider that Bouterse would be entitled to immunity because of his position as state official during the atrocities in December 1982. The Court of Appeal held that the criminal nature of the acts was the reason, why the immunity was lifted. Torture was a crime subject to universal jurisdiction according to customary international law and the Torture Convention. In the case only functional immunity was considered, since it was about immunity of a former state official.

However, the case went to the Dutch Supreme Court. The Supreme Court overruled the Appel Court's decision, but they based their arguments mainly on lack of jurisdiction and did not consider the immunity question.

---

[218] Bekker 2002. See also, the Arrest Warrant case 2002.
[219] Loi relative à la répression des violations graves de droit international humanitaire 1999, article 5.
[220] Reydams 2003, p. 116.
[221] van der Oije, Pita J. C. Schimmelpenninck 2001, p. 455, 460. See also Prosecutor-General of the Supreme Court v. Desiré Bouterse - ICD summary, visited on October 7, 2019 and Trial International web pages: Desiré Delano Bouterse, visited on October 7, 2019.

H.S.A. et al. v. S.A et al.: Ariel Sharon and Amos Yaron

Amos Yaron and Ariel Sharon were defendants in a criminal case brought against them in Belgian Courts in 2001, quite shortly after the Pinochet decision. The criminal complaint was based on the conduct of Sharon and Yaron in 1982, when they both were holding high positions in the Israel army.[222] In 1982, the Israel army occupied west Beirut and surrounded two camps full of Lebanese and Palestinian civilians. Amos Yaron and Ariel Sharon were accused of having allowed a massacre in these camps, when 150 Lebanese Phalangists entered the camps and murdered, abused and raped numerous civilians in the camps, including women and children. The courts of Belgium were investigating the conduct as genocide, war crimes and crimes against humanity.

The case went up to the Belgium's Court of Cessation, which basically ruled on February 12, 2003 that as a sitting head of state – Sharon was at the time of the proceedings the Prime Minister of Israel – Sharon was entitled to immunity *ratione personae.*[223] However, the Court did allow the proceedings to go further in relation to accusations made against Yaron. It seems, that in the case, the Court have denied the immunity *ratione materiae* of Yaron. The arguments of the Court regarding to this denial were not as clear as they have been in other cases. Ultimately, it was based on the broad universal jurisdiction applied in Belgium, since it was concluded that there was no requirement for the person to be present in Belgium's territory in order to be prosecuted for war crimes, crimes against humanity and genocide.[224] Thus, it seems that the Court concluded that functional immunity would not be accorded even if the acts were done in official capacity, if they amounted to international crimes attracting universal jurisdiction.

Later, the case was dismissed based on lack of jurisdiction, when Belgium's law was modified.[225] However, this is again a different matter being a prior step before immunity, thus immunity was not considered at this stage.

Ferrini v. Federal Republic of Germany

The Ferrini case was a case judged by the courts in Italy. During the Nazi atrocities, like

[222] Trial International web pages: Ariel Sharon, visited on October 4, 2019.
[223] H.S.A. et al. v. S.A. et al. 2003.
[224] Trial international web pages: Amos Yaron, visited on October 29, 2019.
[225] Ibid.

many others, Luigi Ferrini was also deported to Germany, where he was transported to a concentration camp and was forced to work.[226] Ferrini started civil proceedings against Germany, trying to get compensation for alleged injuries suffered while he was captured and deported. Even though the case was a civil case, not a criminal case, and there was state immunity in question, it can be considered relevant in relation to head of state immunity rules as well due to its statements.

Both lower courts in Italy during the prosecutions in 2000 - 2002 declined jurisdiction over the case, after which Ferrini brought the case to the Italian supreme court, the Court of Cassation. The relevant argument here made by Ferrini was his statement regarding *jus cogens* rules. He stated that immunity of foreign states should not be upheld, when *jus cogens* norms are violated. In the current case the conduct by Germany amounted to international crimes.[227] These international crimes were deportation and forced labour.

The Supreme Court in Italy overturned the judgments of the lower level courts with its decision on March 11, 2004 allowing jurisdiction over the case and subsequently denied state immunity from Germany.[228] The Court argued that immunity rules protect sovereign acts, but not acts which amount to international crimes. It did note the hierarchy of norms and stated that *jus cogens* norms protect violations of fundamental human rights[229], and thus these norms are on top of the hierarchy. More importantly, the Court stated that functional immunity of foreign state officials could no longer be invoked in cases of international crimes and concluded that this should not be available then in relation to states themselves either. Additionally, it noted that international crimes attract universal jurisdiction.

The decision did not consider personal immunity, thus it did not change the view that is taken in other statements regarding immunity *ratione personae*.

[226] See Ferrini v. Federal Republic of Germany - ICD Summary describing the case. See also Ferrini v. Federal Republic of Germany (en) 2004, visited on October 1, 2019.
[227] Ferrini v. Federal Republic of Germany (en) 2004, p. 3., visited on October 1, 2019.
[228] Ferrini v. Federal Republic of Germany - ICD Summary. See also Ferrini v. Federal Republic of Germany (en) 2004, visited on October 1, 2019.
[229] The importance of human rights has been confirmed already for example in the Corfu Channel 1949 case by the ICJ.

Swiss Federal Criminal Court: the Khaled Nezzar case

The case against the former Algerian Minister of Defence Khaled Nezzar was an interesting criminal case brought against Nezzar in the Swiss Federal Criminal Court, which gave its decision on July 25, 2012. Nezzar was accused of war crimes during the Algerian civil war between 1992 - 2000.[230]

The Court denied functional immunity of this former Minister. It acknowledged that there was a growing trend not to accord immunity *ratione materiae* when *jus cogens* norms, such as prohibition of genocide and crimes against humanity, were breached. [231] The Court stated that "*it would be contradictory and futile to, on one hand, affirm the intention to combat against these grave violations of the most fundamental human values and, on the other, to accept a wide interpretation of the rules governing functional immunity*".[232] The idea that the same international legal order, which should fight against impunity would also allow broad interpretation of functional immunity is controversial.

This case is interesting also, because of its temporal context. The Jurisdictional Immunities of the State decision (Jurisdictional Immunities case) by the ICJ was given just about 5 months earlier than this decision by the Swiss Federal Criminal Court. Even though the ICJ had argued that there is a difference between immunity rules as procedural and *jus cogens* as substantive norms, and that this is the reason why breaches of *jus cogens* norms, being related to substantive law, which states whether the conduct is legal or not, do not affect the rules of immunity, this was not considered in the Swiss case. To the contrary, the Swiss Court noted that there was an explicit trend in international community towards fighting against impunity.[233]

The Jurisdictional Immunities case is considered later in more detail.

Yousuf v. Samantar

Another interesting case regarding its temporal context, for this judgment as well was given after the Jurisdictional Immunities decision, is a case called Yousuf v. Samantar, which was

---

[230] Khaled Nezzar case - IHL database summary, visited on October 16, 2019.
[231] See the unofficial English translation of the case by TRIAL, the Khaled Nezzar case (en) 2012, para 5.3.5.
[232] Ibid., para. 5.4.3.
[233] See also Citroni 2012, EJIL: Talk!, visited on October 16, 2019.

a civil case in the United States Court of Appeals. The judgment was given on November 2, 2012, nine months after the Jurisdictional Immunities decision was given.

Mohammed Ali Samantar acted as Somalia's Minister of Defence and Prime Minister during the years of 1980 - 1990. He was accused of acts of torture, arbitrary detention and extra-judicial killing by government agents under the command and control of Samantar by members of the Somalian Isaaq clan.[234]

The Court referred to a number of American cases and concluded that Samantar is "*not entitled to foreign official immunity for jus cogens violations, even if the acts were performed in the defendant's official capacity*".[235] This was the Court's conclusion even though the case concerned civil remedies. Regarding criminal proceedings, the Court stated that the immunity exception in relation to *jus cogens* violations is much more settled than in civil cases. The Court held the Pinochet case as an important example of this and also the developments after the Pinochet case. It must be noted, that the Court emphasized that it is following the current trend regarding immunity *ratione materiae*, but also recognises that immunity *ratione personae* is still absolute, even when facing *jus cogens* violations.[236]

Ministère Public v. Hissein Habré

Hissein Habré was the head of state of Chad during the years 1982 - 1990. During his time holding the office Habré's regime committed widespread human rights violations against different ethnic groups and political opponents to his regime.[237] After long proceedings against him during years 2000 - 2016 in Senegalese courts with Belgium asking for extradition to Belgia based on issued international arrest warrant having basis on universal jurisdiction, the case was concluded. Before that, the case went up to the ICJ as well, which

[234] Yousuf v. Samantar 2012.

[235] Ibid., p. 21 - 22. The Court referred among others to Compare Sarei v. Rio Tinto 2007, Siderman v. Argentina 1992 and Enahoro v. Abubakar 2005. Despite the Court's conclusion, these cases state that the acts that violate *jus cogens* norms are not counted as sovereign acts. It seems that the Court took a different approach stating that *even when committed in official capacity*, functional immunity is not accorded for *jus cogens* violations.

[236] Yousuf v. Samantar 2012, p. 21. The Court stated that "*American courts have generally followed the foregoing trend, concluding that jus cogens violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against jus cogens claims.*"

[237] Ministère Public v. Hissein Habré 2016. See also Trial International web pages: Hissein Habré, visited on October 21, 2019.

stated that Senegal must either prosecute or extradite Habré, since the Senegalese were at first reluctant to state about the matter.

Finally, the matter was solved by establishing Extraordinary African Chambers (EAC) embedded within the Senegalese judicial system. This court delivered its verdict on May 30, 2016 sentencing Habré to life imprisonment for crimes against humanity, war crimes and torture, thus lifting Habrés immunity as a former head of state. The Court argued that as a head of state, Habré had a central role in the commitment of the atrocities and this is often the case with the most heinous international crimes.[238]

This case has been stated to be a very successful case against impunity, where a foreign former head of state has been successfully convicted by another state's domestic court.[239] However, it must be noted, that EAC is not entirely domestic in nature, but can be described as "internationalized". Nevertheless, the features of EAC are so specific and its nature as internationalized tribunal is so minimalistic and additionally, it is strongly embedded to the Senegalese judicial system that it can be considered to be included in a category where a national court receives assistance from, but is not acknowledged as an internationalized court.[240] Thus, it is a landmark case in favour of a human rights exception to functional head of state immunity. Once again, it must be stated that, although the judgment can be held as a convincing evidence of a human rights exception to functional immunity, personal immunity remains untouchable.

Cases in ICTR and ICTY

As stated earlier, since ICTR and ICTY are special international tribunals having their own statutes lifting immunities of state officials, these cases are not considered in greater detail, since they are not the focal point here. However, some general statements are introduced here, when they consider immunity in national courts.

In Prosecutor v. Ntuyahaga the trial chamber of the International Criminal Tribunal for Rwanda (ICTR) stated on universal jurisdiction, that it encourages all states to prosecute persons responsible for serious international crimes, such as crimes against humanity and

---

[238] Ministère Public v. Hissein Habré 2016, para 2299.
[239] Høgestøl 2016, p. 153.
[240] Williams 2013, p. 1147. See also Høgestøl 2016, p. 152.

genocide.[241]

In Prosecutor v. Milosevic the trial chamber of International Criminal Tribunal for the former Yugoslavia (ICTY) lifted the immunity of Milosevic, who was the former President of Serbia. The statement was mainly based on the statute of ICTY but was backed up by arguing that there was also a customary international law establishing this. As an example, the trial chamber referred to the Pinochet III judgment.[242] Thus, it may be interpreted that the trial chamber thought this rule of customary international law covered national courts as well.

Additionally, there are other judgments stating similar matters, for example that every state has the right to try persons committing international crimes and that universal jurisdiction is applicable for international crimes, which were given some years before the Pinochet III.[243]

4.2.1.2 Cases not supporting a human rights exception

The Arrest Warrant case in ICJ

As described, a Belgian judge issued an international arrest warrant against the incumbent Minister for Foreign Affairs of DRC taking part of the immunity discussion. However, Congo raised the matter in the ICJ. The arguments of the ICJ are presented here as an evidence of the state of customary law in relation to immunity rules.

The ICJ noted that regarding the merits of the case, it was about immunity of an incumbent Minister for Foreign Affairs, since at the time Belgium circulated the arrest warrant Yerodia was still in office as the Minister for Foreign Affairs of DRC.[244] In short, the Court did not find support for the claims that there would be an exception to immunity regarding incumbent Ministers for Foreign Affairs. It based its argument on its interpretation on the current state practise.

Since the main question before the ICJ concerned personal immunity of an incumbent Minister for Foreign Affairs, the court did not reason its stance on immunity *ratione materiae*

[241] Prosecutor v. Ntuyahaga 1999, p. 5. This decision was given only 6 days before the Pinochet III decision, thus the proceedings have happened partly at the same time.
[242] Prosecutor v. Milosevic 2001, para 26 - 34.
[243] See Prosecutor v. Furundija 1998, para 156 and Prosecutor v. Tadic 1995, para 62.
[244] The Arrest Warrant case 2002.

that profoundly. It did list four situations, when immunity would not be available for incumbent or former Ministers for Foreign Affairs and in this list, in an *obiter dictum*, it held that *"Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity".*[245] Thus, without a reasoning, the Court stated that immunity would be only lifted in relation to private acts of a former Minister for Foreign Affairs. The Court did not consider a possible human rights exception in relation to *ratione materiae*, which is a clear weakness in the case. However, by not considering it, the Court did not deny its possibility expressly either.

Germany v. Jiang Zemin

Jiang Zemin was a president of People's Republic of China for ten years during March 1993 - March 2003. He was accused of alleged persecution of the Falun Gong practitioners.[246] Zemin and other members of the Chinese government were accused of genocide, crimes against humanity and torture among other crimes. This criminal complaint against Zemin was issued on November 2003, and almost year and a half later the Federal Prosecutor of Germany gave their decision. The prosecutor dismissed the complaint arguing that as a former head of state, Zemin enjoyed immunity.

It has been criticized that the Federal Prosecutor used an expansive interpretation of the judgment by the ICJ in the Arrest Warrant case.[247] It must be noted that the Arrest Warrant case concerned sitting minister for foreign affairs, which can be equated with head of state, whereas Zemin was a former head of state when the criminal complaints were raised against him. Thus, it is incorrect to use the Arrest Warrant case as a basis for the conclusions in this case. This kind of argumentation is not convincing in that such an expansive interpretation, when alleged international crimes are at stake, should be very carefully rationalized.

---

[245] Ibid., para 61.
[246] Langer 2011, p. 30. See also, Germany: End Impunity through Universal Jurisdiction (no Safe Haven Series no. 3) 2008, p. 102.
[247] Kaleck 2009, p. 952.

France v. Donald Rumsfeld

In 2007, a number of international NGOs filed a criminal complaint against Donald Rumsfeld, the former Secretary of Defence of the United States.[248] The complaint was filed before the Paris district prosecutor while Rumsfeld travelled to France. Donald Rumsfeld was accused of acts of torture and other violations of international law based on his command responsibility in the US run detention facilities in Iraq, Afghanistan and Guantánamo. The legal basis for the complaint was in article 689 of the French Code of Criminal Procedure, which basically implemented universal jurisdiction and the Torture Convention.

The complaint was first handled by a district prosecutor on November 2007, who dismissed the complaint by arguing that immunity should be accorded to Rumsfeld based on that the acts of torture were carried out in the exercise of his functions. The prosecutor stated that immunity applied also after leaving the office to actions performed while in the office, which in this case the alleged acts of torture were. This is a bit inaccurate statement and has to be interpreted to mean the actions performed in *official capacity* while in the office, not all the acts.

The case was appealed to the federal prosecutor, who gave the decision on February 27, 2008, basically stating the same than the district prosecutor. The federal prosecutor stated that the alleged acts of torture "*cannot be dissociated from [Rumsfeld's] functions*", thus immunity applied, since they were carried out while he was in the office.[249] This must be interpreted in a way, that the federal prosecutor based the according of immunity on the fact that the acts of torture were done in official capacity while Rumsfeld was still holding the office.

The federal prosecutor also compared this case to the Pinochet case, which is relevant, since the two cases are lot alike. However, the prosecutor stated that the two cases differed in a sense that the actions of Pinochet "*did not fall under the exercise of his functions as President but were marginal to them*", whereas the acts of torture could not be separated

[248] Gallagher 2009, p. 1109 - 1110.
[249] Case of Donald Rumsfeld 2008. See also Gallagher 2009, p. 1111. It must be noted that Gallagher is stunned by the prosecutor's argumentation, where he simply places the acts of torture to the official-acts category. This is not the point that should be made from the prosecutor's argument. The flaw in the prosecutor's argument was that he does not reason, why Pincohet's conduct is marginal and not done in official capacity as well. The problem here is not that whether torture is an official act or not (because the Torture Convention requires that it is), but whether immunity should still be lifted because of the gravity of the act.

from Rumsfeld's functions. This argument seems really separate and is not justified in any way. Additionally, it is not relevant to ponder, whether the acts of torture have been part of Rumsfeld's official functions, since the Torture Convention itself, which was implemented by the French Criminal Code, requires that the acts of torture need to be done in official capacity. The prosecutors should have argued, that even though the alleged acts have been done in official capacity, should there be an exception to immunity based on the nature of the act and the Torture Convention. This is not considered in great detail, but the federal prosecutor plainly states that *"This immunity cannot be set aside on the grounds that certain violations, because of their gravity, make it impossible to maintain it*".[250]

Bashir decisions in South African courts

There was a bit different angle to the immunity question in the so-called Bashir case in South African courts. Omar Al-Bashir was a president of Sudan from 1993 until spring 2019. He was accused of crimes against humanity, war crimes and genocide due to which ICC has issued several international arrest warrants against Bashir in 2009 and 2010.[251] The Supreme Court of Appeal of South Africa was contemplating on the question what it should do, when it had two contradictory obligations: assist international court in arresting Bashir and honouring head of state immunity.

In its decision the Supreme Court expressed its opinion also regarding the state of customary international law in relation to head of state immunity. In this case the question was about immunity *ratione personae*, since Bashir was still the president of Sudan at the time of the arrest warrants and the proceedings in the South African Supreme Court, in spring 2016. The main substance matter in the decision was applying of domestic law. However, the Court noted that at this stage the state of international law was that there is no international crimes exception to head of state immunity before foreign national courts. As mentioned, this opinion was in relation to an incumbent head of state, not a former head of state: the Court differentiated the decision from the Pinochet case, because Pinochet was a former head of state. The ICC also stated that in international courts head of state immunity could be lifted, but this was not applicable to national courts and this was also the opinion of the Supreme Court of Appeal of South Africa.

[250] Case of Donald Rumsfeld 2008, p. 2.
[251] Omar Al Bashir 2016. See also Sadat 2019, Just Security, visited on October 7, 2019.

This case is important in a sense, that it clearly differentiates the immunity issue in national and international courts and argues in relation to both types of courts, stating basically that even though it would be possible to lift head of state immunity in international courts, it is not possible in foreign national courts. The emphasis is different in the case, and additionally, it must be noted that the case is about an incumbent head of state, not a former head of state, which the Court clearly acknowledges. Thus, this judgment is quite clearly against a human rights exception to personal immunity but does not argue as strongly in relation to functional immunity.

4.2.1.3 Cases not clearly stating on a human rights exception in criminal proceedings

Distomo Massacre case

Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre case) was a case being judged in the Supreme Court of Greece based on atrocities done by the German forces in a Greek village called Distomo.[252] In June 1944, the German forces killed 300 people in the village and the relatives of the victims claimed damages due to these happenings. Thus, this case was also a civil case concerning state immunity but dealt with important general matters relating immunity issues, as many other cases introduced here.

The Court denied immunity in the case and allowed the Greek Court's jurisdiction over it. The Court argued that there was a restrictive immunity rule existing in customary international law as well as in the European Convention on State Immunity, which meant that state immunity applied only *acta jure imperii.* It further argued that customary international law included a tort exception to immunity, but more importantly to present purposes, the Court argued, that since the conduct by German forces breached the most fundamental *jus cogens* norms of international law, Germany must have waived its immunity implicitly. This was also the Courts final argument in the case. Thus, this case showed a sort of human rights exception to immunity, but it was constructed around the theory of implied waiver, which has not got too much of a support.[253] Because of its weaknesses as an argument in addition to that Distomo massacre case was a civil case, it is counted under this category, showing just a weak support for a human rights exception.

[252] Distomo Massacre case 2000.
[253] See Jones v. Kingdom of Saudi Arabia 2006, para 62.

Al-Adsani v. the United Kingdom in the ECHR

This case was a civil case concerning state immunity in the UK courts. Mr. Sulaiman Al-Adsani had a dual citizenship of the UK and Kuwait. In May 1991, Al-Adsani was severely tortured in Kuwait by Sheikh Jaber Al-Sabah Al-Saud Al-Sabah.[254] He was falsely imprisoned in Kuwaiti State Security Prison, beaten, his head was held under water and he also suffered severe burns covering a quarter of his body. In August 1992, Al-Adsani instituted civil proceedings in the UK in order to gain compensation from the Sheikh and the state of Kuwait. The end result was that Al-Adsani was granted leave to serve the proceedings on the individual defendants, but the state of Kuwait was granted immunity based on the State Immunity Act 1978.

Al-Adsani appealed to the ECHR alleging that the English courts failed to secure enjoyment of his right not to be tortured and denied him access to court, contrary to articles 3, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In its very controversial judgment given on November 21, 2001, the ECHR did not think that these articles were breached by according the state of Kuwait immunity.[255]

However, for the current purposes, it is important to note, that the ECHR did separate state immunity in civil proceedings and individual criminal responsibility and functional immunity in criminal proceedings. It referred to the Pinochet III judgment and stated that it accepts *jus cogens* status of the prohibition of torture and acknowledged the Pinochet III decision in that it concerned immunity of a former head of state in criminal proceedings whereas this decision was about state immunity in civil proceedings.[256] Thus, at least an exception to functional head of state immunity in foreign criminal proceedings was not wholly negated.

Bouzari et al. v. Islamic Republic of Iran

Bouzari v. Iran was a civil case concerning state immunity. Mr. Bouzari was detained and tortured by Iranian officials after he refused to accept the assistance offered by the sitting Iranian President at the time for bringing into effect a project in oil and gas field in Iran.[257]

[254] See Al-Adsani v. the United Kingdom 2001.
[255] Similar was also concluded in another judgment by the ECHR in McElhinney v. Ireland 2001.
[256] Al-Adsani v. the United Kingdom 2001, para 61 and 65.
[257] Bouzari et al. v. Islamic Republic of Iran 2004.

Eventually, he and his family were able to flee to Canada, where they brought a case against the state of Iran claiming damages for acts of torture that he was a victim of.

The Court of Appeal for Ontario, Canada held similarly to the Superior Court of Justice, that there is no treaty or rule existing in customary international law stating, that there would be universal jurisdiction over acts of torture in civil cases. The Court also held that according to Canada's State Immunity Act (SIA), foreign states are immune in Canadian courts in relation to civil proceedings. However, it is important to notice that there is an exception in SIA regarding criminal proceedings. The provision states that "*This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings*."[258] The Court did not hold that the provision would apply in the case. However, it is important to notice that this kind of criminal proceedings exception is mentioned in Canada's domestic legislation.

Jones v. Ministry of Interior of Saudi Arabia

Another case by the UK's House of Lords is the so-called Jones case, where the House of Lords handed down its judgment on June 14, 2006. The background for the case was that Jones and other three applicants were falsely prisoned by Saudi Arabia.[259] All of the four applicants were UK nationals. During the imprisonment, the four people were allegedly tortured, and they stated that due to this torture they suffered injuries, both physical and mental. The proceedings were based on Jones' and Mitchell's, Sampson's and Walker's claims of, amongst other things, torture, assault and battery and false imprisonment. These claims were raised against the Ministry of Interior of the Kingdom of Saudi Arabia and other lower level officials. In the case, it was accepted that Ministry of Interior equalled as the state itself.

In the Court of Appeal the case got interesting, because the Court held that the state itself would be immune from these civil proceedings, but the state officials would not enjoy immunity. The decision was appealed to the House of Lords by all of the parties. The House of Lords upheld state immunity for the state itself and its officials.

Lords Bingham of Cornhill and Lord Hoffman argued in favour of Saudi Arabia's claim in detail, of which the other Lords agreed. They stated that the UK's State Immunity Act 1978,

[258] Canada's State Immunity Act 1982, section 18.
[259] See Jones v. Kingdom of Saudi Arabia 2006.

which was in line with relevant international instruments, did not include any exceptions to immunity regarding acts of torture and physical and mental injury caused by the conduct.[260] They also argued that state immunity cannot be circumvented by suing the officials of the state.[261] This argument was based on the fact that state cannot perform without its officials. Thus, functional immunity, i.e. immunity *ratione materinae*, protects the officials as well. They also took the UN Immunities Convention as very authoritative, even though it is not yet in force. However, the Convention does not provide for this kind of exception either.[262]

Relevant to note, however, is that these proceedings were based on civil claims instead of criminal claims like the Pinochet case was. The reason, why this is relevant, is that the cases were both based on claims regarding acts of torture. Thus, the Lords naturally considered also the Torture Convention and noted the distinction between criminal and civil proceedings: only the criminal proceedings were subject to universal jurisdiction[263] and thus, also functional immunity was only revoked in the case of criminal proceedings[264], but this does not create an exception to immunity in civil proceedings. Thus, this could be interpreted in a way, that still in criminal proceedings a former head of state would not be immune in connection with acts of torture and that this decision does not weaken the stance the House of Lords took in the Pinochet case. It was argued by Lord Hoffman that "*It would be clearer to say that the Torture Convention withdrew the immunity against criminal prosecution but did not affect the immunity for civil liability*."[265]

Additionally, relevant in the case was the argumentation against the statement that since the prohibition of torture is *jus cogens* norm, act of torture could not be an official act. Lords stated that this would be paradoxical, since in order for the act of torture to be in line with the definition of torture in the Torture Convention, it must be done in official capacity. Thus, in that case it cannot be non-official in relation to immunity rules.[266] This is important, because in relation to functional immunity, it is important whether the act is counted as

---

[260] Jones v. Kingdom of Saudi Arabia 2006, para 9.
[261] The House of Lords noted that this had been stated in other judgments as well, such as Holland v. Lampen-Wolfe 2000, Propend Finance Pty Ltd v. Sing 1997 and Schmidt v. Home Secretary of the Government of the United Kingdom 1994.
[262] Jones v. Kingdom of Saudi Arabia 2006, para 26.
[263] Ibid., para 32.
[264] Ibid., para 68.
[265] Ibid., para 68.
[266] Ibid., para 79.

official or not. In the judgment it was thus argued, that even an illegal act can be done in official capacity.

In relation to immunity *ratione personae,* the Court seemed to accept that it is inviolable irrespective of the nature of the proceedings.

Fang v. Jiang

In Fang v. Jiang, the High Court of New Zealand based a lot of its arguments in the Jones case. Basically, the Court agreed on everything with the House of Lords. Additionally, this case was also a civil case based on alleged acts of torture.

In the case, there were eleven plaintiffs that were allegedly tortured as part of a systematic agenda by the government of the People's Republic of China between 1999 and 2002.[267] The defendants in the case were the former President of the PRC, the former Vice-Premier of the State Council and a member of the Politburo of the Central Committee and Secretary of the Political and Judiciary Committee of the Central Committee.

Some highlights of the arguments, which were a lot of repetition from the Jones case, were the emphasizing of the UN Immunities Convention as a very powerful and quite recent statement of nations' opinion regarding immunities. There is no *jus cogens* exception mentioned in the Convention. It must be noted though that the Convention is not yet in force, thus some reservations has to be taken.

The High Court of New Zealand did not contest the status of the prohibition of torture as a peremptory norm. Additionally, the important matter to note in this judgment was that, although the case concerned civil proceedings, the Court did highlight the distinction between civil and criminal proceedings as it was highlighted in the Jones decision as well. It was noted that "*There are obvious grounds for distinction between criminal and civil proceedings in respect of alleged acts of torture*".[268] The Pinochet case was also considered in this judgment and it was said that there is no asymmetry between civil and criminal proceedings that are arising from the Torture Convention and the Pinochet III judgment. It was also acknowledged in this judgment as it was in the Jones judgment as well, that the Torture

[267] Fang v. Jiang 2006.
[268] Ibid., para 63.

Convention attracts universal jurisdiction in criminal proceedings, even though it does not do so in civil proceedings.

Thus, it can be interpreted that the Pinochet case was accepted in the Jones case and in this current case as well, since the rigid distinction was done between civil and criminal proceedings. Although at first sight it would seem that the Jones decision would have ultimately negated the Pinochet III decision, both being judged by the House of Lords, it seems that this is not the case, but they can co-exist.

The Jurisdictional Immunities of the State case by the ICJ

In 2008, Germany instituted proceedings against Italy in the ICJ, claiming that Italy has breached its international obligations by allowing state immunity to be lifted in civil proceedings against Germany.[269] In short, the ICJ held in its judgment given on February 3, 2012 that, in fact, Italy had breached its obligations towards Germany when allowing proceedings against the state to go on in the courts of Italy. The most important point the Court made was that they made a difference between procedural and substantive rules of international law. The Court stated that *"The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."*[270] Thus, the Court held that whether or not Germany's actions are unlawful, it does not matter in relation to immunity rules and made this way a difference between procedural and substantive norms.[271]

However, it must be noted that the Court also did note in the judgment that it considered only immunity of the state itself and did not state anything about immunity in criminal proceedings against officials of a foreign state.[272] Thus, this statement weakens the effect of the judgment in relation to the present issue of head of state immunity. What is

[269] Jurisdictional Immunities of the State 2012.
[270] Ibid., para 93.
[271] The ICJ has held similarly before in the Arrest Warrant case 2002 and Armed Activities on the Territory of the Congo 2006.
[272] Jurisdictional Immunities of the State 2012. In paragraphs 87 and 91 the Court emphasises that the question to be considered in the case is state immunity and "*the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not an issue in the present case*."

interesting is that the ICJ separated the question of state official immunity in criminal proceedings, but did not consider it in detail, that is, did not deny the existence of a possible exception either.

It must be noted that relating to state immunity, there is a distinction between acts done *jure imperii* and acts done *jure gestionis*. If there is an exception to state immunity based on acts of commercial nature – and this is very much accepted in international law – this judgment of the ICJ should only be considered as a starting point to this discussion, not the ending point. If the commercial nature of an act can be relevant in relation to state immunity, why the criminal nature of an act could not be relevant in relation to state immunity and head of state immunity as well?

To continue this thought, differentiating actions in state immunity as *acta jure imperii* and *acta jure gestionis* is at the same time taking a stance to the substantive nature of the act. The same is true for head of state immunity *ratione materiae*. Thus, functional immunity is then a substantive norm of international law. Although immunity *ratione personae* would be intact because of its procedural nature, this would not be true for immunity *ratione materiae.*[273] Since immunity *ratione materiae* is relating to the substantive law, matters such as criminal nature of an act may have an effect on it.

4.2.2 National legislations

When discussing immunity and state practise and *opinio juris* related to it, normally national legislations on state immunity are examined. As discussed earlier in chapter 2.2.3, there is quite strong relationship between state immunity and head of state immunity. Some states do have immunity legislation, but these are covering state immunity, not head of state immunity. Separate doctrine of head of state immunity is not covered in these immunity acts.[274] This is the reason, why these immunity acts are dealt with only briefly, in order to discover what kind of evidence of a human rights exception to head of state immunity in criminal proceedings they would provide, at least through analogy.

In this context, it would be more relevant to examine how many countries and what kind

---

[273] See Cassese 2002, p. 862 - 863. Cassese made clear this categorization already in relation to the Arrest Warrant case 2002.

[274] Some of them may equate the head of state with the state itself, but fully developed rules regarding head of state immunity are not included in national legislations. See Fox 2008, p. 668.

of legislation there have been established in relation to international crimes and what kind of provisions they include regarding getting the accused before courts, for example, is official capacity of the accused a defence or not. These may show a strong *opinio juris* in relation to immunity rules challenged by international crimes and human rights violations. If a piece of law enables a state to prosecute citizens of another state for international crimes, it may include some kind of version of universal jurisdiction. Since universal jurisdiction is designed to hold the high-ranking officials accountable, logically national legislation containing universal jurisdiction should allow the prosecution of state officials and then, official capacity should not attract immunity in relation to international crimes.

Amnesty International has done an extensive survey on domestic legislation relating to universal jurisdiction among the UN member states. According to the survey 163 states from 193 states in total are able to exercise universal jurisdiction over one or more international crimes according to the state's national legislation.[275] Out of these national legislations, it would be important to note, how many of the ones, which include some sort of universal jurisdiction also include irrelevance of official capacity, since this would mean that official capacity is not a defence to establishing jurisdiction. It must be noted that the preliminary idea of universal jurisdiction is to hold the perpetrators of the most heinous crimes accountable for their conduct. The nature of these kinds of crimes often demands that they are initiated by high-ranking officials such as heads of state.

For example, at least legislation in Algeria, Argentina, Austria, Azerbaijan, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cameroon, Canada, Cape Verde, Comoros, Côte D'Ivoire, Cyprus, Ethiopia, France, Germany, Ghana, Guinea, Israel, Italy, Jordan, Madagascar, Malaysia, Netherlands, Russia, Senegal, Singapore, Sudan, Switzerland, the United Kingdom, the United States, and Yemen allowed prosecution of foreign officials for crimes they have committed abroad either by specifying that the foreign perpetrators can be 'any person' or without specifically excluding officials or explicitly mentioning the irrelevance of official capacity.[276]

These are just examples and others could be listed above as well. However, there where inaccuracies related to some states' legislation on universal jurisdiction. These inaccuracies

[275] Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update, p. 2.
[276] Ibid., p. 22 - 123.

were related e.g. to improper defences related to superior orders, recognition of immunity claims by officials and limiting universal jurisdiction to residents or to persons who subsequently would gain residency or nationality of a country. These kinds of restrictions do not belong to the definition of universal jurisdiction, according to which it should allow the prosecution of foreign citizens and, as argued many times before, this should include also foreign officials such as heads of state.

However, at least the willingness to include universal jurisdiction to their national legislation by three quarters of the UN member states shows quite strong commitment to the principle. At least it shows that there is openness towards the idea of a human rights exception in relation to international crimes and other serious human rights violations.

Surprisingly enough, immunity acts found in national legislations are more common in common law countries as they are in civil law countries.[277] The most significant immunity acts are in the US, the UK, Canada and Australia. There are immunity acts in Argentina, Singapore, South Africa, Pakistan and Israel as well.[278] However, all of these acts are considering state immunity, not proper head of state immunity. None of them are including a human rights exception type of an exception to immunity.[279] Nevertheless, many of these state immunity acts are quite old, between 1976 - 1995, excluding the Israel's act, and thus have not been updated recently. Still, for example in Yousuf v. Samantar the US courts concluded that functional immunity of foreign officials is not accorded in a case of *jus cogens* violations.[280] Additionally, the UK's House of Lords concluded when arguing in the Pinochet case that the UK's State Immunity Act leads to a conclusion that the Act is not even applicable to the merits of the case.[281] Thus, when these national immunity acts consider in the first instance state immunity, not head of state immunity, they cannot be given a strong weight.

4.2.3 Other evidence of state practise and *opinio juris*

Quite shortly after the Pinochet decision, in August 2001, the *Institut de droit international* affirmed a human rights exception to head of state immunity in its session in Vancouver. In the resolution the Institute adopted in the session it is stated in article 13(2) in relation to

[277] Bröhmer 1997, p. 51.
[278] Costelloe 2017, p. 252.
[279] Ibid., p. 265.
[280] Yousuf v. Samantar 2012, p. 21 - 22.
[281] See Pinochet III 1999. This was concluded by all of the Lords.

former heads of state that "*Nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources.*"[282] Thus, the resolution calls after an exception that is based on the nature of the act as an international crime.

One important and recent expression of opinion by the international community is the above-mentioned draft articles by International Law Commission on immunity of state officials from foreign criminal jurisdiction. This is a work that started already in 2006 by recommendation of the working-group, which was subsequently adopted by General Assembly resolution on December 6, 2007.[283] While the project is on-going the UN member states can affect the articles and many of them have already submitted their comments.

The last version of the draft articles in its entirety has been published in the Special Rapporteur Escobar Hernández' seventh report on April 18, 2019 to the seventy-first session of the ILC. Hernández also made proposals for the articles 8 -16 of which the drafting committee only had time to consider the draft article 8. The final report of the ILC from the seventy-first session is not yet published.

In these provisionally adopted draft articles personal and functional immunity are defined as they are currently understood in customary international law. Immunity *ratione personae* is reserved only to Heads of State, Heads of Government and Ministers for Foreign Affairs and there are no exceptions to it.[284] Immunity *ratione materiae* is covering only the official acts done while holding the office.[285] The most important draft article is the article 7, which is stating the exception to immunity *ratione materiae* from foreign criminal jurisdiction in relation to crime of genocide, crimes against humanity, war crimes, crime of apartheid, torture and enforced disappearance.[286]

[282] Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law - Session of Vancouver 2001, article 13.
[283] A/RES/62/66, December 6, 2007.
[284] A/CN.4/729, April 18, 2019, p. 69. See the draft articles 3 and 4.
[285] Ibid., p. 70. See the draft article 6.
[286] Ibid., p. 70. See the draft article 7.

This work of the ILC has lasted over a decade and will continue still, maybe another decade. These draft articles are very important, since when finished they will give a long-expected relief to the current, debated situation of head of state immunity question in a form of a multilateral treaty.

Compared to the UN Immunities Convention 2004, there is not yet a final version ready from the ILC's work on immunity of state officials from foreign criminal jurisdiction. However, the Immunities Convention is not yet in force.[287] This Convention does not mention exception in relation to international crimes or *jus cogens* norms for that matter. This has been noted also in decisions concerning immunity.[288] Additionally, in article 3 of the Convention it is stated that the Convention does not affect head of state immunity *ratione personae*. It does not take any stance on head of state immunity *ratione materiae.*

Still, this Convention is mainly concerned on state immunity, which, however, is not strictly separated in the Convention from head of state immunity. It has a different emphasis, than the issue in question here. In addition, the Convention was adopted on December 2, 2004, almost exactly three years before the resolution by the General Assembly deciding to start the ILC's work on immunity of state officials from foreign criminal jurisdiction was adopted. This shows that in the opinion of the UN, the state official immunity question, including the head of state immunity question, was far from settled, and that the UN Immunities Convention did not suffice. Since this Immunities Convention is not in force and has been ratified only by 22 states and the draft articles on state official immunity represent much more recent opinion on the matter, the weight that is put on the Convention cannot be very high. However, it has not stated anything about immunity *ratione materiae*, thus it has not stated against an exception to functional immunity either.

As for the European Convention on State Immunity, it does not make any references to heads of state nor to any exceptions relating to international crimes or human rights violations.[289] As noted, it has been ratified only by 8 states, thus it cannot be considered as a very strong evidence of *opinio juris* in relation to immunity questions.

[287] See UN Treaty Collection - Convention on Jurisdictional Immunities of States and Their Property, visited on October 18, 2019. The Convention would need 30 ratifications in order to entry into force, when it has currently only 22 ratifications.
[288] See Jones v. Kingdom of Saudi Arabia 2006, para 26 and Fang v. Jiang 2006, para 65.
[289] See the European Convention on State Immunity 1972.

Additionally, the aspects already introduced in relation to the crimes and serious human rights violations show some support to a human rights exception. Almost all of the crimes introduced are subject to universal jurisdiction and conventions covering them are either including statements on irrelevance of official capacity or are actually demanding that the criminal actions conducted are done in official capacity.[290] These taken together are supporting a human rights exception to immunity. For example, the article 4 of the Genocide Convention states that "*Persons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals*." Irrelevance of official capacity then means that regardless official capacity, persons committing genocide should be held accountable. Torture Convention requires that acts of torture are done in official capacity. This is a strong statement towards a human rights exception, because it would be illogical that the same action that is punishable according to the Convention, would at the same time attract immunity.[291] When this is accepted for the crimes that have their own convention, this should be accepted for the crimes of similar gravity and features: if a crime or human rights violation is mostly performed by high-ranking officials, according immunity would be against the virtues international law is trying to protect. Nonetheless, these conventions and features of the crimes are supporting a human rights exception to head of state immunity, at least *ratione materiae*, since it is relating to substantive law as established above.

Otherwise, the scholars have not found a consensus regarding the subject.[292] This shows that at least the relationship between head of state immunity and international criminal and human rights law is in a flux, which makes this an interesting and relevant question and gives hope, that there is a possibility for a human rights exception.

As it is such a complex issue with various sides to it, the rules on individual criminal responsibility must be remembered on the background. These rules have been established precisely for the reason that state officials could not hide behind their official capacity and their position as a representative of state.[293] These rules on individual criminal

[290] See for example the Torture Convention 1984 and the Genocide Convention 1948.
[291] The Torture Convention 1984 has 169 member states, thus it is very widely applied. See Un Treaty Collection - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, visited on October 18, 2019.
[292] See for example Cassese 2002, Akande & Shah 2011, Man-ho Chok 2014, Mettraux & Dugard & du Plessis 2018, Bradley & Helfer 2010, Barker 2013, Wuerth 2012 and O'Keefe 2017.
[293] Frulli 2018, p. 777.

responsibility have been stated for example in the Genocide Convention, in the Geneva Conventions and Additional Protocols I and II 1977 to them and in the Torture Convention as well as in other international tools such as in the Draft Code of Crimes Against the Peace and Security of Mankind 1996 and also some Security Council resolutions and the Nuremberg Charter.[294] All the core international crimes introduced are attracting individual criminal responsibility.[295] However, it has been argued that this individual criminal responsibility do not apply in front of national courts.[296] The above mentioned conventions in relation to the international crimes, which may be applied in national courts, prove different.

5. Conclusion

5.1 Human rights exception: *ratione personae*

As it can be seen, the state of head of state immunity is in a flux, this cannot be denied. There are instances, which support its existence, matters, that deny it altogether and then there are statements, which stay quite silent or vague about the matter. What is certain, is that a lot has happened from March 24, 1999, when the Pinochet III judgment, the decision that shocked the whole word, was given. This includes national and international cases, national legislations, different draft articles and many more.

The conclusion will be divided in relation to immunity *ratione personae* and immunity *ratione materiae*. Additionally, it will be concluded what is the scope of a possible exception to these two different forms of immunity: whether it is a general one, covering all the crimes and human rights violations considered in the thesis or whether it is more narrow, covering only one or several of the crimes introduced.

First, it will be concluded whether there actually is a human rights exception in relation to personal immunity of incumbent heads of state. When examining the state practise and *opinio juris* it is shown that human rights violations and international crimes are very much condemned by the international community. The very large amount of member states in international conventions, such as Torture Convention and Genocide Convention, is only one evidence of this. In addition, universal jurisdiction is gaining more support, which is

[294] Shaw 2008, p. 400 - 402.
[295] Ibid., p. 430 - 440.
[296] See for example, Lord Goff of Chieveley in Pinochet III 1999.

shown by the high number of states, which have included universal jurisdiction in their national criminal legislation. However, not all of them are applying universal jurisdiction as it has meant to be applied – official capacity defences still exist or universal jurisdiction is not truly universal, but its applying is linked to residency or nationality requirements. The meaning of universal jurisdiction is to capture the perpetrators committing the most heinous of crimes, which often are breaches of *jus cogens* norms. All the crimes and human rights violations in the thesis represented are such atrocities[297] and these atrocities are if not necessary then most of the times commenced by the most high-ranking officials, such as heads of state. The high number of states supporting universal jurisdiction reflects – at least in theory – the willingness to prosecute and punish all the persons committing the most heinous crimes, whichever capacity they are acting in.

Other state practise and *opinio juris* also pronounces on immunity *ratione personae*. The international arrest warrant issued in Belgium in 2000 was issued against incumbent Minister for Foreign Affairs of DRC, Mr. Yerodia for international crimes he had committed or was responsible for during his regime. The Belgian domestic law at the time had broad interpretation of universal jurisdiction, which allowed it to try even incumbent foreign high-ranking officials. However, DRC took the matter in front of the ICJ, which stated that there is no human rights exception to the immunity of Minister for Foreign Affairs, equating with head of state. The case concerned only immunity *ratione personae*, since the Court did not actually separate properly between the two types of immunities and did not state anything relevant in relation to *ratione materiae,* except the basic definition of it. The Bashir case in South African courts stated the same regarding personal immunity: although immunity could be lifted in international courts, this has not as of yet reached national courts.

Even though there have not been many cases in national or international courts[298] about personal immunity of heads of state in *national courts*, there have been even more cases centring on functional immunity, which have stated on personal head of state immunity on the side. Many of these cases, whether accepting or not that there actually is some sort of a human rights exception to immunity *ratione materiae*, have noted that immunity *ratione*

[297] It must be noted, that even though crime of aggression can be counted to international core crimes, it is not currently subject to universal jurisdiction or at least this is very much under debate.

[298] One must not count in incumbent head of state immunity in front of established international courts such as ICC, ICTY and ICTR, of which statute's include provisions, which are lifting the immunity even for incumbent heads of state in these courts. International responsibility is thus, a different matter.

personae is not affected. This has been stated for example in the Pinochet III judgment itself among others by Lord Goff of Chieveley and Lord Hope of Craighead, in the case against Mr. Yaron and Mr. Sharon and in the Yousuf v. Samantar case.

In a way, this has been stated in the Jurisdictional Immunities case by the ICJ as well. The case was about state immunity and did not differentiate between immunity *ratione materiae* and immunity *ratione personae*. However, the point the Court was making in the case is relevant in relation to head of state immunity as well. The Court concluded that procedural and substantive norms should be separated, meaning that although an international crime would constitute to a breach of a peremptory norm, such as prohibition of torture, since it is a substantive norm at its nature stating whether a conduct is lawful or unlawful, it does not affect immunity, since it is a procedural norm establishing a bar to jurisdiction. However, as studied earlier, the Court overlooked one very important thing. It is true that personal immunity relating to status is a procedural norm, but functional immunity relating per se to the categorization of acts according to their nature, is by its definition a substantive defence relating to substantive law. Thus, even when followed the rationalization of the ICJ – the substantive norms do not affect the procedural norms – immunity *ratione materiae* might be affected. However, this argument strengthens the notion that immunity *ratione personae*, in this case being a procedural norm, would be inviolable.

In conclusion, it seems to be quite evident that currently there is not a human rights exception existing to personal head of state immunity, but it remains inviolable. However, since this is not the case in international courts and incumbent high-ranking officials have been sentenced in ICTY, ICTR and the Nuremberg trials, it is not highly impossible, that this would spread to the national courts as well one day. The fact, that the issue is even under debate, shows that some cracks to the very absolute immunity *ratione personae* are already forming. However, there have to be very strong evidence of a human rights exception in order for it to be established in customary international law, since immunity is a strong rule, and there currently is not.[299]

[299] See Military and Paramilitary Activities in and against Nicaragua 1986, para 186. The Court noted that while the practise of states need not to be completely consistent "*instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule*."

5.2 Human rights exception: *ratione materiae*

Since head of state immunity is divided into functional and personal immunity, which have their differences, the existence of a human rights exception to functional immunity must be considered separately. There is also a lot more material of customary international law relating to it.

The Pinochet III judgment is in the heart of this question. It was the first time, when a foreign former head of state was tried and found guilty by a national court. Although the decision can be described as revolutionary and the House of Lords is highly valued and respected national court, the decision itself represents just one national decision and cannot in itself form an exception to immunity. However, the clear – and almost unanimous – result of the case was that Pinochet does not enjoy immunity as a former head of state for acts of torture. Six Lords out of seven came to this conclusion, although they all had slightly different routes, as noticed.

In the heart of the case were the acts of torture committed by Pinochet's regime. Thus, the reasonings by the Lords were very much based on the Torture Convention's wording, which was the base for the section 134 of the UK's Criminal Justice Act 1988. Other arguments were more convincing than the others. Lord Millet was arguing that Torture Convention had created a situation, where immunity could not follow, when a head of state had committed acts of torture. Additionally, he stated that the Convention did not create a new crime, but just verified its position. He did not think, that since torture is counted as an international crime, it would then follow that it cannot be an official act, which was the basis for Lord Hutton's argument. As previously demonstrated, this was correctly argued. It would be very controversial, if torture would not be counted as an official act in relation to immunity, when it must be done in official capacity according to the Torture Convention.

Thus, when Lord Millet rightfully corrected this misinterpretation, he stated that it would not be possible for immunity *ratione materiae* and the Torture Convention to co-exist. It could not be, that at the same time torture committed in official capacity would be punishable, but then immunity would be accorded for the very same act. The House of Lords in the Jones case described Lord Millet's reasoning as "*unassailable*".[300] What makes Lord

[300] Jones v. Kingdom of Saudi Arabia 2006, para 81.

Millet's argument even more convincing is that it is based on a thorough review of state practise and *opinio juris.*

Lord Phillips of Worth Matravers argued similarly, stating that since torture amounts to an international crime, immunity cannot be accorded. He is giving the Genocide Convention as an example noting, that the Genocide Convention is actually expressly lifting immunity in relation to the crime of genocide. However, he stated that this would not be necessary, since there is no rule established in international law, stating that immunity *ratione materiae* should follow, when a person has committed international crimes. This is a bit vaguely stated, since immunity *ratione materiae* is granted for the official acts of a former head of state and international crimes can be – and very often are – these kinds of official acts and an exception should be proved in relation to that rule. However, Lord Phillips of Worth Matravers redeemed himself by arguing, that international crimes, which attract universal jurisdiction, should not be covered by functional immunity. This is convincing, since the meaning of universal jurisdiction is to hold the people who have committed the most heinous crimes accountable. More often these are the most high-ranking officials. If immunity would follow, universal jurisdiction would be completely 'a dead letter'.

This decision, as revolutionary as it was, cannot establish a human rights exception to functional immunity on its own. Additionally, although the reasonings are welcoming an exception based on the nature of the act as an international crime, they are at the same time quite heavily relying on the section 134 of the Criminal Justice Act and the Torture Convention. Thus, it would depend on the developments after the Pinochet III case, how this decision should be interpreted: is it a start for a general human rights exception or is it just an exception based on the Torture Convention and that it would apply only in the case of torture defined in the Convention.

There have been a lot of judgments supporting a human rights exception after the Pinochet III case, but also quite a lot of cases not supporting it or cases which have been quite vague on a human rights exception in criminal proceedings. Many of these vague cases can be taken as a weak support to a human rights exception in criminal proceedings, since many of them have not actually denied it, even when they have acknowledged the issue to some extent.

In addition to Belgium's international arrest warrant, cases regarding Bouterse, Yaron and

Sharon, Ferrini, Nezzar, Samantar and Habré in addition to some general arguments stated in ICTR and ICTY were supporting a human rights exception to immunity *ratione materiae.* In Bouterse, the Court of Appeal denied immunity based on the criminal nature of the act. Although it was later overruled in the Dutch Supreme Court, this was not related to the immunity question, but the Supreme Court thought that there was no jurisdiction at all. In case concerning Yaron and Sharon, the Belgian Court de Cassation concluded that Sharon was enjoying immunity as an incumbent head of state, but Yaron was not accorded functional immunity. The Supreme Court in Italy argued that although immunity would protect sovereign acts, it did not cover acts which amounted to international crimes. The Swiss Federal Criminal Court and the United States Court of Appeals both stated that there was a growing trend not to accord functional immunity in case of *jus cogens* violations. In the Habré case, the Court noted the fact that often the most heinous crimes are commenced by high-ranking officials. Regardless of the reasoning of the courts, the fact is that all of the cases were concerning international crimes.

Although these judgments are quite numerous and consistent in stating that, when an act amounts to an international crime and breaches the prohibitions of these crimes, causing a violation of *jus cogens* norms, then immunity *ratione materiae* should not be accorded, it is still not certain whether these are enough. What is striking is that the ICJ nor the ECHR have not considered explicitly, that functional immunity should be lifted in case of international crimes and serious human rights violations in foreign criminal proceedings.

This is not the case in relation to decisions, which do not support a human rights exception. As mentioned, the ICJ stated in the Arrest Warrant case that personal immunity of high-ranking officials would be inviolable even when facing international crimes. It must be noted that the case did not consider functional immunity in depth and it has been criticized on not being able to differentiate between these two sides of head of state immunity. The ICJ did state that in relation to immunity *ratione materiae* only exception to immunity was private acts, which is the basic definition of functional immunity. In the Jiang Zemin case, the Federal Prosecutor of Germany argued that Zemin would enjoy immunity as a former head of state. He based his conclusions to the Arrest Warrant case. However, the Arrest Warrant case considered personal immunity of incumbent high-ranking officials, thus this reasoning by the Federal Prosecutor lacks plausibility. In the case concerning Donald Rumsfeld, the reasoning was quite non-existent. The prosecutor correctly argued that the

acts of torture were carried out in Rumsfeld's official capacity. However, where they were mistaken was their statement regarding the Pinochet III judgment claiming that the acts of torture were not part of Pinochet's official functions. This kind of inconsistency makes the reasoning extremely unconvincing. Additionally, the prosecutor did not consider a human rights exception to functional immunity in detail. The result in Bashir case in South African courts was that international crimes exception does not reach the national courts as of yet. However, this case did not concern functional immunity, but remained silent.

The cases, which have been introduced in the thesis in relation to immunity, but which are unclear regarding immunity in criminal proceedings are very interesting as well, since customary international law is about what is said, but also about what is left out. Many of these cases while denying an exception to immunity in civil proceedings, are acknowledging the difference between civil and criminal proceedings and are, for example, referring to the Pinochet III decision. This difference has been recognised in the Al-Adsani, Jones, Fang v. Jiang and Jurisdictional Immunities cases.

The Jurisdictional Immunities case was interesting in itself, since it was found very decisive with relation to the immunity question. In that case the ICJ noted that *jus cogens* norms relate to substantive law stating on lawfulness of a certain conduct and thus do not affect immunity rules, them being procedural in nature. This is very convincing and sounds like a closing statement to this discussion. However, this may affect to personal immunity, which makes it even harder, also in the future, to try to develop a human rights exception to it. Nevertheless, as opposed to personal immunity, functional immunity is a substantive defence to jurisdiction and is thus relating to substantive law. Therefore, this ICJ decision does not bear with relation to immunity *ratione materiae* and at least procedural nature is not the reason, why immunity *ratione materiae* could not be affected by a human rights exception.

In the Distomo Massacre case, a human rights exception was actually accepted, but it was formed around the implied waiver theory, which has not got very much support and is flawed as stated earlier. In the Bouzari case, the Canadian court accorded immunity. However, it was noted that the Canadian State Immunity Act does include some kind of exception relating to criminal proceedings. In the case, the Canadian court did not apply that provision, it being a civil remedy case.

In addition to the popularity of national criminal legislations' application of universal jurisdiction, a very recent opinion in relation to functional immunity is expressed through the ILC's work on immunity of state officials from foreign criminal jurisdiction. Although there is no final draft of the articles as of yet, the way they currently are shows strong support for a human rights exception. Additionally, many states have already submitted their statements in relation to the articles. Currently, the draft article 7 states that immunity *ratione materiae* does not apply when a person has committed genocide, crimes against humanity, war crimes, torture, crime of apartheid or enforced disappearances. This is as clear as it gets. When the ILC's work will be finished, it will be a triumph of human rights.

The UN Immunities Convention has been taken as a strong evidence of the consensus of the international community.[301] It does not include any kind of a human rights exception. However, the Convention was concluded already 15 years ago, and it still has not gained the required 30 ratification in order for it to enter into force. To the contrary, this could be taken as a strong consensus against the Convention. Additionally, in 15 years there have been a lot of development in the area, including the new draft articles with the international crimes exception. Time has passed the Convention, and it is not as current anymore as it was 15 years ago. It does not include proper provisions in relation to head of state immunity. Since the UN Immunities Convention was taken as a strong opinion against a human rights exception, the current draft articles by the ILC can be taken as a strong opinion in favour of a human rights exception.

The situation relation to functional immunity is more complex as it is relating to personal immunity. There are almost as many matters favouring the exception as there are against it. Of course, the amount of them is not the only way to evaluate the issue, but also how convincing or authoritative they are. It must be noted that there is no judgment by the ICJ favouring a human rights exception. However, there are many national cases in favour of a human rights exception and their arguments are quite consistent: they are based on the nature of the act as an international crime, international treaties covering these crimes, universal jurisdiction and logic – the absurd idea that the same rules of international order would condemn certain kind of conduct and then at the same time provide safe havens to people acting that way. Looking into the judgments not supporting a human rights

[301] This has been stated for example in the Jones v. Kingdom of Saudi Arabia 2006 and Fang v. Jiang 2006 cases.

exception, although there are convincing arguments among them, for example the Jurisdictional Immunities case, many of them are fairly weakly argued or are not properly argued at all. What comes to the Jurisdictional Immunities case, it has been already concluded that it does not hinder the formation of a human rights exception to immunity *ratione materiae*.

One can always argue, that the perpetrators cannot escape international responsibility, and this is the reason why immunity should be accorded in national courts. However, as stated earlier, input of national courts is needed for various reasons: the resources of international courts are not sufficient enough, the procedure can be really slow and bureaucratic, and the procedure in national courts can be sometimes easier for it is nearer to the actual happenings. National courts are needed in the fight against impunity.

However much one might be inclined to lean towards a human rights exception to functional head of state immunity, it must be noted that immunity is a very strong rule of international law. Although there is no treaty covering exactly head of state immunity, it is strongly rooted in customary international law. Its nexus with state immunity and diplomatic immunity strengthens its position even more. The rationale of immunity is extremely strong, and it is accepted that immunity rules are a necessity in order for the international community to function properly. An exception to a strong rule like this must be sufficiently well established.

Taking all of this into consideration, although there are national and international cases arguing both sides, other state practise and *opinio juris* are clearly enough leaning towards a human rights exception. Thus, it is concluded that at least some kind of a human rights exception exists to functional immunity of heads of state in foreign criminal proceedings. This is supported by the cases that clearly and consistently favour this exception, but also by the cases that do not clearly state regarding the matter: they are leaving a sufficient doubt that, in relation to criminal proceedings, such an exception could exist. Additionally, the current ILC's work on draft articles and all the multilateral treaties and national legislations introduced are strengthening this position. It must be also noted that full unanimity is not needed.[302]

[302] See Military and Paramilitary Activities in and against Nicaragua 1986, para 186.

Additionally, this is the only logical conclusion as well. This is the conclusion craved after individual criminal responsibility and the constructions of universal jurisdiction and irrelevance of official capacity: the features which are in common to the international crimes introduced. Without this exception, these would be 'dead letters'. These general principles of international law emerged so that state officials, and most importantly heads of state, could not hide behind their official status and behind the state. Furthermore, when reviewing the rationale of immunity, it must be noted that the proper functioning of a state does not require that former heads of state should be immune for criminal actions. Thus, immunity *ratione materiae* is established for essentially different reasons than protecting former heads of state, when they have committed international crimes.

5.2.1 Scope of the exception

The scope of the human rights exception to functional immunity must be clarified as well. As it was stated from the beginning, the goal was to examine whether a human rights exception, which includes international crimes but also other serious human violations, could exist. However, as noted earlier, the argumentation in the cases is based mostly on the criminal nature of the acts or on the conventions covering the acts. In the cases, where a broader argumentation is based on the *jus cogens* nature of a norm, which could in theory then include also prohibition of serious human rights violations, the conduct in question has always amounted to an international crime. Thus, the scope in the cases has not included other serious human rights violations as well. Therefore, it would be a far reach to conclude from there that all the serious human rights violations would be included in the human rights exception. The scope of the exception, which stems from the customary international law, is in all its simplicity that former heads of state do not enjoy functional immunity in foreign criminal proceedings, when they have committed acts, which amount to international crimes. This would require that there would be an act amounting to an international crime attracting universal jurisdiction. This will leave the crime of aggression out, which is also supported by customary international law and lack of national cases. This kind of international crimes exception is also supported by opinions of scholars.[303] This will be confirmed by a multilateral treaty, when the work of the ILC is finished.

[303] See for example Cassese 2002, Akande & Shah 2011, Koivu 2003, Bröhmer 1999, Foakes 2011, Wirth 2002, Zappalà 2001 and Citroni 2012, EJIL: Talk!.