

Bachelor Thesis

Head of State Immunity in the Case of Grave Violations of Human Rights

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Introduction

In 1999, the British House of Lords' trial in which Augusto Pinochet, the former Chilean head of state, was charged for alleged crimes of torture, murder and hostage-taking attracted attention worldwide. With much interest and – in many cases – with a considerable sense of satisfaction, the public witnessed that for the first time in history, a former head of state was stripped of his immunity because of the grave human rights violations he was accused of having committed. The Lords' decision, which was met with great euphoria by many and with profound concern by others, had exposed with the utmost clarity how sensitive the question being at stake here is both morally and politically. A closer look at the Lords judgement also reveals that the question of how to resolve the conflict of head of state immunity and international human rights protection is a question of considerable legal complexity. The fact that the seven judges were far from adopting a common opinion, but instead referred to various approaches and used strongly differing explanations clearly indicates the subject's intricacy.

In this thesis, it will be discussed under which conditions a (former) head of state¹ could be stripped of his immunity due to the violation of human rights, with the Pinochet case as one important cornerstone of the argumentation. The first and second part will examine the legal basis for the concepts of head of state immunity and of international human rights protection. By establishing head of state immunity as a norm of international customary law (part 1.1.) and by showing the jus cogens character of human rights (part 2.2.), the basis for the analysis in the third part is constructed. Part 1.2. and 1.3. will put these norms in the context of international law. It will thereby be shown that each one represents a different conception of international law. Part three, the main part of this thesis, will then analyze how the courts resolve the conflict between these two concepts. Instead of presenting the courts' action case by case, three central lines of argumentation, each of which puts forward a different exception to head of state immunity, are excerpted from the courts' judgements. These will subsequently be discussed in the light of the relevant literature.

¹ Following the approach taken in the Arrest Warrant case - which reflects the current state of international law - according to which the head of government and the minister of foreign affairs or even other persons of high rank in principle enjoy the same quality of immunity as head of states (ICJ, Arrest Warrant ,2000,para.51), large parts of the analysis done in this thesis could be analogously applied to those state officials. Due to the limited space of this thesis no special attention could be devoted to this group of state officials in particular.

1. The immunity of heads of states and of former heads of states

In order to explore the principle of head of state immunity as a concept of international law, in this first part an analysis of the relevant norms of international law will be carried out. It will be proven that the immunity of heads of state is determined by international customary law, the ambit of which will subsequently be shown. This legal analysis will be completed by a discussion of the conceptual background of the head of state immunity. By subsequently putting it in the context of international law, it will be argued that head of state immunity can indeed be seen as directly resulting from state sovereignty. In the overall structure of the paper this first part serves as the basis for discussing possible exceptions to head state immunity in the case of human rights violations, which will form the third part of this thesis.

1.1. The legal foundation of the head of state² immunity³ in international law

For head of state immunity to be an identifiable concept of international law, it has to be provided for in either the written documents of international law or in international customary law. When analyzing the body of written international law regarding the existence of head of state immunity, three documents in particular, the Vienna Convention on Diplomatic Relations (VCDR)⁴, the Convention on Jurisdictional Immunities of States and their

² According to *Arloth* and *Tilch* in the German Encyclopaedia of Law the head of a state is “the organ of the state that is at the top of the state representing it as a whole” (cf. *Arloth*, 2001, p. 3951, own translation). Similar definitions can be found in *Creisfelds*, 2007, p. 1081; *Tangermann*, 2002, p. 89; *Köbler*, 2007, p. 389; *Zehnder*, 2003, p. 41. As there is no space to further discuss the concept of head of state it should only be noted that the question of who is considered a nation’s head of state is reserved to the respective nation-state. The person who according to the respective national constitution holds the highest ranked political office is the head of state in the sense of international public law. That person consequently enjoys the privileges attributed to this position (cf. *Lüke*, 2000, p. 91; *Zehnder*, 2003, p. 41).

³ According to *Stein* immunity is “the right of a state and its organs not to be held responsible for their acts by the (judicial) organs of other states” (*Stein*, quoted in *Bröhmer*, 1997, p. 3). This means that a state must not exercise the jurisdiction that it possesses on its territory against another state’s organ protected by immunity (cf. *Real*, 2004, p. 75f; *Arloth*, 2001, p. 2283). The concept of immunity does however not mean that the state organ of the foreign state is not bound to the laws of the territorial state in question or would be above its legal order. As *Shaw* puts it “immunity does not mean exemption from a legal system of the territorial state in question” (*Shaw*, 2008, p. 700). It simply constitutes a formal obstacle for the implementation of national law by the courts.

⁴ Article 31 of the VCDR codifies the immunity of diplomatic personnel before criminal as well as – with some exceptions – administrative and civil courts. According to articles 1-3 of the convention these provisions exclusively refer to diplomats and their direct relatives. Even though some scholars are in favour of applying these norms to heads of state analogously (cf. e.g. *Zehnder*, 2002, p. 44), clearly the VCDR cannot serve as an autonomous legal basis for the immunity of heads of state (cf. *Appelbaum*, 2007, p. 62; *Hokema*, 2001, p. 29).

property⁵, edited by the International Law Commission, as well as the Convention on Special Missions and the Optional Protocol concerning the Compulsory Settlements of Disputes⁶, could provide a possible legal basis, due to them being important texts dealing with the question of immunity (cf. Alebeek, 2008, p. 7; Hokema, 2002, p. 28; Zehnder, 2002, p. 43). But in fact none of them can serve as a sufficient basis for head of state immunity.

Also when looking at regional conventions, only some indications for the existence of head of state immunity can be identified⁷.

Hence, the analysis of international documents clearly reveals that written international law does not contain a comprehensive legal basis for head of state immunity (cf. ILC, 2008a, p. 15). Therefore, it must now be analyzed whether its existence can be based on customary international law.

According to the International Court of Justice (ICJ) a norm of customary international law exists if the acts concerned “amount to a settled practice” which is accompanied by an “*opinio juris sive necessitates*” (ICJ, *Nicaragua v. USA*, 1986, §207), which according to *Ipsen* and *von Buttlar*, could be reflected by actions of a state, either of legal or of purely factual character (cf. *Ipsen*, 1999, p. 191; *Stein/Buttlar*, 2009, p. 39).

Applying these criteria, *Lüke* argues that a first indication of the states compliance can be seen in the fact that around the world very few trials are organized against heads of state of a

⁵ The Draft Convention on Jurisdictional Immunities of States and their Property mostly deals with the immunity of states before the courts of another state. It also determines that heads of state are excluded from prosecution by all courts of a foreign state. However, the Convention has not yet entered into force. Therefore, the convention cannot form an autonomous basis for the existence of head of state immunity (cf. UN-Convention on Jurisdictional Immunities of States and their Property, 2004).

⁶ Articles 29-35 of the Convention on Special Missions lay down privileges and immunities of members of special missions. Article 21 of the same convention determines that “the head of state 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 the head of state on an official visit” (cf. UN-Convention on Special Missions, 1969). The convention does neither specify the privileges and immunities that are mentioned, nor does it say whether the immunities that it defines in article 31 for the members of special missions are applicable to heads of state as well. The convention only refers to immunities defined by existing international law and thereby can be seen as an important indicator for its existence, however it does not constitute any rights or immunities for heads of state itself.

⁷ The European Convention on State Immunity, adopted in 1972, does not mention heads of state *expressis verbis*. From Article 27 of the convention it can only be inferred that they are included in the rules of immunities laid down by the document (cf. Council of Europe, ECSI, 1976). However, the Convention is only of limited relevance, as since 1972, only eight states have joined it (Council of Europe, European Convention on State Immunity, Chart of Signatory States). A more explicit expression of heads of state immunity can be found in the Bustamante Code, which is valid in numerous countries in South America. Article 297 of which determines that the Head of each of the contracting States should be exempt from the penal laws of the others when he is in the territory of the latter (cf. *Tangermann*, 2003, p. 157). But because of its limited geographical scope, the treaty can of course not lay the basis for an international norm of head of state immunity.

foreign country (cf.Lüke,2000,p.94)⁸. The validity of this approach has to be contested, because the mere fact that the courts of a foreign country do not target heads of state does not necessarily reflect the state's respect for immunity, but could also result from political or economic considerations. In order to prove a consistent conduct it seems more promising to refer to the large number of cases before national and international courts in which heads of state were granted immunity (cf.Real,2004,p.90;Hokema,2002,53). As it is not possible to give a comprehensive list of cases, reference is made to cases that should here serve as examples

(cf.Appelbaum,2007,p.61;Lüke,2000,p.94;Tangermann,2002,p.95;Zehnder,2002,p.45). In the case *Lafontant v. Aristide*, the US-American court decided that a rule of customary international law existed according to which then president Aristide possessed immunity. In the case *Mobuto v. SA Contoni*, the Belgian court ruled that on Belgian territory all heads of state possess absolute immunity (cf.*Mobuto* published in Donner,1994,p.388). In the Gaddafi case the French Cour de Cassation stated that “ international custom precludes the institution of proceeding against incumbent heads of State before criminal jurisdiction before a foreign State” (Gaddafi,2001,p.508). These cases exemplify the general consensus, according to which heads of state are given immunity. It can hence be concluded that the first precondition for the existence of a norm of customary law, the consistent conduct criterion, is fulfilled.

For the second precondition to be fulfilled, the states must have the belief that this practice is rendered obligatory by the existence of a rule of law (cf.ICJ,Continental Shelf,1968). According to *Ipsen* and *Hobe* the existence of such a belief could be expressed by national immunity legislation (cf.Ipsen,1999,p.195;Hobe,2008,p.194;Alebeek,2008,p.10).

The following examples will show that around the world state immunity is fixed in national law. According to §1604 of the United States Foreign Sovereign Immunity Act, foreign states are generally given immunity before US courts. §1603 of the same document determines that the head of state is included in the term “foreign state” (cf.US-FSIA,1976). The United Kingdom State Immunity Act contains a very similar provision (cf.UK-SIA,1978,sect.14I). As a state having ratified the European Convention on State Immunity, Switzerland grants far-reaching immunity to foreign heads of states (cf.Council of Europe, Chart of Signatory States,2010;Habscheid,1990,p.74). These examples show the existing consensus according to

⁸ *Hokema* applies the same logic when pointing out that neither the former head of state of the German Democratic Republic Honecker, nor the former Russian President Jelzin nor the current Chinese Head of State Hu were ever charged when visiting countries in which they were accused of having committed severe crimes (cf.Hokema,2002,p.34).

which heads of state should generally be granted immunity⁹. It can hence be concluded that the second precondition for the existence of a norm of customary international law, the existence of an *opinio juris sive necessitatis*, is fulfilled.

At the end of this legal analysis, reference should be made to the existing consensus among international scholars that heads of state should in principle be granted immunity (cf. Hobe, 2008, p. 372; Hokema, 2002, 53f; Ipsen, 2004, p. 383). This reference is important, because the opinion of the leading international scholars in the field of international law can also be seen as the expression of an existing norm of international customary law (cf. Herdegen, 2006, p. 136ff.).

Summarizing the findings of the analysis above, one can conclude that written international law does not contain norms that could constitute a legal basis for head of state immunity. However, customary international law does clearly exempt heads of state from the prosecution of a foreign state's courts. The question of the specific actions falling under this customary immunity will subsequently be discussed.

1.2. Scope of immunity and conceptual justification of head of state immunity

In the following paragraph, the scope of the granted immunity will be examined both for current and former heads of state. This analysis will be completed by an exploration of the conceptual justification regarding head of state immunity.

Scope of head of state immunity

According to customary law¹⁰, the head of state is principally granted full or absolute immunity, meaning that he is protected from legal prosecution before all sorts of courts, no matter whether his action is of an official (*acta iure imperii*) or of a private nature (*acta iure gestinois*) (cf. Cassese, 2008, p. 117f; Hobe, 2008, p. 372; Stein/Buttlar, 2009, p. 254; Alebeek, 2008, p. 169). Despite some indication that the immunity of heads of state could be limited before civil courts (cf. Lüke, 2000, 94; Alebeek, 2008, p. 178), the absolute immunity is supported by a broad consensus within literature (cf. ILC, 2008, pp. 61, 89) and state conduct (cf.

⁹ That being said, one also has to point out the differences with regard to possible exceptions. It is especially with regard to acts committed in private capacity that considerable differences can be detected (cf. Hokema, 2001, p. 41; Bosch, 2004, p. 79).

¹⁰ With regard to the question of the scope of head's of states immunity little evidence is provided by written international law. As Alebeek puts it "the guidance by treaty law [...] is limited and generally unhelpful" (Alebeek, 2008, p. 177). Therefore this thesis will not effect an analysis of it.

e.g. US District Court: *Lafontant v. Aristide*; *Farouk v. Dior*, discussed in Lauterpacht,1996p.228) which has been prominently expressed by the International Court of Justice, when stating that “in international law it is firmly established that [...] certain holders of high-ranking office in a State, such as the Head of State [...] enjoy immunities from jurisdiction in other States, both civil and criminal” (ICJ,Arrest Warrant,2000,p.20f).

An aspect of special interest to this thesis is the immunity of former heads of state. It is “unanimously accepted in doctrine and is confirmed by national judicial decisions” (ILC,2008,p.59), that after having left the office, a former head of state loses the so-called immunity *ratione personae*¹¹. Whereas *acta iure imperii* carried out during the time in office prevail to be covered by immunity, all acts considered being of private nature, *acta iure gestionis*, are open for juridical prosecution (cf. e.g. Ipsen,p.383; *Farouk v. Dior*, discussed in Lauterpacht,1996p.228; ILC,2008,p.56f).

The actions committed by a head of state in official capacity are considered actions by the state itself. As Alebeek puts it, such acts are considered “a mere arm or mouthpiece of a foreign state” (Alebeek,2008,p.112) Therefore even after heads of state have left office, they are protected from juridical review of those acts. Reviewing them would mean a post-review of the action of the state itself and would therefore violate the principle of state immunity (cf.Alebeek,2008,p.105). These actions are protected by what is generally referred to as immunity *ratione materiae*¹².

The restricted immunity for former heads of states leads to the question which acts committed by a head of state can be seen as official and which must be considered private. In literature the various criteria that could qualify an action as official are discussed (cf. especially Appelbaum,2007,p.108f;Zehnder,2002,p.51;Tangermann,2002,p.133). It nevertheless seems that “within international law no general standard for which actions belong to the official acts of a head of state has developed so far” (Bosch,2004,p.77, own translation; cf.Lüke,2000,p.93). Whether grave violations of human rights or the commitment of international crimes can be judged official acts is a question that will be discussed in the third part of this paper.

¹¹ The immunity *ratione personae*, also called personal immunity, bases the protection from legal prosecution on the personal status attributed to the office of a person as head of state. In that sense, the head of state is immune because of its special rank. Consequently its action is protected regardless of its legal character (cf.ILC,2008,p.57;Appelbaum,p.72f),

¹² Immunity *ratione materiae* is linked to the legal character of action. Its scope is restricted as actions of a head of state are protected only insofar as they are of public nature, as they are *acta iure imperii*.

Conceptual background

In former periods, not much attention was given to the theoretical justification of this far-reaching protection of heads of state, as they were considered to be identical with the state. This concept, most famously expressed by the maxim “l’État, c’est moi” by Louis XIV, led to the absolute immunity granted to states automatically including the head’s of state right to immunity (cf.ILC,2008,p.23). But since the end of the royal empires in the 20th century which were based on the unity of state and head of state, the question of heads of state immunity has become an independent aspect of international law (cf.Appelbaum,2007,p.61). This being said, head of state immunity is still closely linked to the immunity of states. Still today, the head of state is considered the personification or the highest representative of the state. As Zehnder puts it, “he embodies the dignity of the nation” (Zehnder,2002,p.44, own translation). Consequently an action directed against the head of state would generally be seen as an action directed against the state as such and therefore as a violation of its immunity. Another source of justification, that is given even more attention today, derives from the fact that, a state is only able to act via natural persons holding certain offices acting in the name of the state. Their protection from legal prosecution is therefore considered a necessary precondition for ensuring state immunity. For these reasons the immunity of heads of state can be directly derived from the immunity that states grant to one another, it can be seen as one “specific expression of state immunity” (Tangermann,2002,p.148, own translation;cf.Institut de Droit International,2001,preamble;ILC,2008,p.53).

In the light of this direct link between immunity of states and its highest representatives some scholars pose the question whether the increasingly restricted immunity of states today¹³ can still serve as a sufficient basis for absolute head of state immunity. *Tangermann* and *Bosch* ask whether the restricted approach taken with regard to the immunity of states must not be transferred to the heads of state (cf.Tangermann,2002,p.141;Bosch,2004,p.87f). To defend the absolute immunity against those doubts, it is argued that bringing charges against a head of state, no matter whether for an official or a private act, would inevitably violate the dignity of

¹³ Reacting to an increased international commercial activity, courts consecutively started to apply a restrictive approach, according to which state immunity would be limited to so called *acta imperii*, acts committed in official capacity. In consequence, states were no longer “immune from the jurisdiction of foreign courts as their commercial activities are concerned” (§1602,US-FSIA,1976;cf.Appelbaum,p.48). The new restrictive approach put forward by Italian courts in the 1880s (Cass.Napoli1886, Cass. Firenze 1886) was for example followed by Belgian courts in the 1930s, in the “Tate letter” of the American State Department in 1952 or the German Bundesverfassungsgericht (Heizungsreperatur-Fall) in 1963. After the socialist countries adopted this line in the 1980s (cf.Bosch,p68), China seems to be the only country worldwide that sticks to the maxim of absolute state immunity (cf.Doehring,2004,p.292; ILC,2008,p.24).

a nation, would constitute an obstacle to the effective representation of a state and would therefore represent a serious threat to international cooperation (cf. Applebaum, 2007, p. 64; ILC, 2008, p. 63)¹⁴. Other authors explain the absolute immunity of heads of state by making reference to the high standard of immunity granted to diplomats¹⁵.

1.3. Contextualization within the overall order of international law

In the previous part it has been shown that state immunity forms the major conceptual basis for the immunity of heads of state. In order to put the concept of head of state immunity within the broader context of international law, it is therefore indispensable to provide a short analysis of the immunity of states.

Traditionally state immunity is inferred from the dignity of the state. In the milestone judgement on *Schooner Exchange*, the US Supreme Court elaborated that subjecting a state to another state's jurisdiction would be "incompatible with its dignity and the dignity of its nation" and that states would be bound by "obligations of the highest character not to degrade the dignity" (US Supreme Court, *The Exchange v. McFaddo*, 1812, p. 11). Even though the line of argumentation adopted here is still commonly used, today state immunity is most often based on the sovereign equality of all states (cf. ILC, 2008, p. 21; Ipsen, 2002, p. 373). According to the concept established by *Jean Bodin*, sovereignty includes the right of every state to be independent and free from the influence or control of other states when acting within the realm of its state authority (cf. Cordes, 2008). This claim of sovereignty is translated into a general prohibition for states to interfere within the area of sovereignty of other states. The

¹⁴ For example the French cour de cassation has underlined in the Ghaddafi case that "the principle of the immunity of Heads of State is traditionally regarded as a rule of international custom necessary for the preservation of friendly relations between States" (Gaddafi, 2001, p. 98ff.).

¹⁵ According to Art 31 of the VCDR, "a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction". In other words, diplomats possess immunity for both official and private acts. Some scholars argue that these norms should be taken as a minimum-standard for the degree of protection given to the head of state, as its role and function exceeds the one of diplomats (cf. ILC, 2008, pp. 20, 91; O'Neill, 2002, 294). Others point at the fact that the role and function of heads of state and of diplomats are comparable so that the regulations laid down in the VCDR could be applied *mutatis mutandis* (cf. Zehnder, p. 43f.). Even though this approach has been contested by some scholars, it has been adopted in several court judgements. In the arrest warrant judgement the ICJ has pointed out that the Convention on Special Missions, the Vienna Convention on Consular Relations and the VCDR "provide useful guidance on certain aspects of the question of immunities" (ICJ, Arrest Warrant Case, p. 22). The Federal Supreme Court of Switzerland even went one step further when applying the VCDR analogously (Federal Supreme Court of Switzerland, *Marcos c. Office fédéral de la police*, 02.11.1989). The analogous application is even fixed in national law: §20 of the British State Immunity Act determines that via the British Diplomatic Privileges Act, the VCDR can be applied to a head of state.

juridical review of actions by foreign states is seen as one of the many possible forms of intervention (cf.Hobe,2008,p.370f; Alebeek,2008,p.67). The sovereign equality can therefore be translated into a general prohibition for states to review the action of other sovereign states, or positively, into the right of every state to immunity (cf.Herdegen,2006,p.225;Damian,1985,p.15). This principle is commonly expressed in the maxim of “par in parem non habet imperium” or “par in parem non habet iurisdictionem”¹⁶. As it has been shown, the immunity of heads of state has to be understood as a direct expression of the principle of sovereignty, which itself must be seen as one of the most central principles of international law. In the “classical order of international law” (Hobe,2008,p.36, own translation) the sovereignty of states had even been the central Leitmotiv (cf.Hobe,2009,p.37). Even though in the current structure of international law, this principle has been limited by various elements, the principle is still of key importance. For example, the UN Charter defines that “[the United Nations] organization is based on the principle of the sovereign equality of all its Members” (cf.UN-Charter,art.2,1). When discussing possible exceptions from head of state immunity in case of human rights violations in the third part of this paper, it should therefore be kept in mind that questioning the immunity of heads of state means questioning the sovereignty of states and thereby one of the central principles of international law.

¹⁶ The quotation is generally traced back to a prominent legal scholar of medieval times, Bartolus. In his book *Tractatus Represalium* (1354), he wrote: *Non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium*“ (cf.Liebs,2207,p.157).

2. International human rights protection

In part two international human rights protection will be analyzed. Special attention will be given to the jus cogens character of human rights, as this special status will be an important point of reference for the analysis of the conflict of human rights and immunity in the third part of this thesis. For a better understanding of its character but also of the conflict dealt with in part three, the international human rights protection will also be put in the context of international law.

2.1. The internationalization of the human rights protection

The analysis of today's international law clearly reveals that the states have established a comprehensive set of legally binding norms protecting everybody's fundamental rights. It can be said, that the post World War II era has led to a profound internationalization of human rights protection. (cf. Kimminich, 2000, p. 339)¹⁷. Today it is practically unquestioned that human rights have become a "principle that runs through all parts of international law" (Hobe, 2008, p. 421, own translation)¹⁸.

2.2. The legal status of human rights in international law

In various national legal orders, human rights are explicitly granted a special status. They are part of national constitutions and for that reason possess a higher rank than simple norms. Such a clear and explicit hierarchy of norms does not exist in international law (cf. Seidl-Hohenveldern, 2001, p. 332). Nevertheless, there are some norms of international law that are attributed a particular coercive quality and that are therefore referred to as jus cogens (cf. Ipsen, 2002, p. 186; Alebeek, 2008, p. 205; Browlie, 2008, p. 537). Those norms being the basis for a possible exception to head of state immunity, the jus cogens character of human rights is a question of particular interest to this thesis and therefore devoted special attention.

¹⁷ Due to the limited length of this thesis a more detailed analysis of the international human rights protection cannot be done.

¹⁸ A general definition of the common understanding of Human Rights was given in the Universal Declaration of Human Rights (UDHR). The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have played a major part in transferring those rights into legally binding standards of international law. The European Convention for the Protection of Human Rights and Fundamental Freedoms is one example of human rights protection on the regional level.

The concept of jus cogens was established in the Vienna Convention on the Law of Treaties which stated that any “treaty is void if it conflicts with a peremptory norm of general international law”, which is in the following sentence defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character” (VCLT,1969,art.53). According to the same article, the existence of a jus cogens norm relies on its recognition by the international community as a whole and therefore remains dependent on the will of states (cf.Dahm/Delbrück/Wolfrum, 2002,p.711).

The recognition of a set of norms from which no international agreement is allowed to deviate from represents a remarkable rupture with the classical order of international law, which had been characterized by the nature of international law as jus dispositivum¹⁹ and by the fact that the states were given the freedom to conclude agreements of any content.

However, the question which norms are part of jus cogens is a controversial one²⁰. When trying to clarify it, special attention is given to the explanation put forward in an obiter dictum by the ICJ in the Barcelona-Traction case, in which it stated that there existed a set of rights in international law that were of a special importance and that could therefore establish special obligations for a state, the so-called obligations erga omnes. The court argued that this set of legal principles included “the outlawing of acts of aggression and of genocide” but also “the basic rights of the human person” (ICJ,Barcelona Traction,1970,paragr.34). Though these norms were not explicitly addressed as jus cogens, it is generally considered that the ICJ, by pointing at their particular importance for the international community, ascribed to them the special character of jus cogens norms (cf.Ipsen,2002,p.192;Browlie,2008,p.537). Another indication with regard to the norms belonging to jus cogens can be found when looking at the commentary of the ILC on article 53 VCLT. In its comment it reports that its members suggested declaring the following acts an violation of jus cogens: acts of violence prohibited by the UN-Charter, the commitment of international crimes, slave traffic, piracy or genocide as well as acts violating the equality of states, the right of self-determination or human rights.

¹⁹ Norms of jus dispositivum are norms that states are free to deviate from by establishing contrary agreements. In principle, jus dispositivum is only binding for those states that have accepted the norm in question (cf.Hobe,2008,p.179).

²⁰ This has for example been expressed by the intense discussions within the International Law Commission (ILC) during the preparatory stages of the VCLT. Because no consensus could be reached among the members of the ILC, not even examples of jus cogens can be found in the text of the convention (cf.Kadelbach,1992,p.41ff).

Even though there remains some controversy on this question, particularly among scholars (cf. Dahm/Dehlbrück/Wolfrum, 2002, p. 716; Steiner/Alston/Goodman, 2007, p. 168; especially Hannikainen, 1988, 522f), it can be inferred from state practice and related literature that jus cogens includes the prohibition of acts of aggression and the interdiction of intervention, the norms of humanitarian international law and in addition, fundamental human rights (cf. Hobe, 2008, p. 180; Ipsen, 2002, p. 193; Herdegen, 2006, p. 143; Browlie, 2008, p. 490).

This finding leads to the question, which human rights are seen as fundamental or elementary and are therefore considered to be part of jus cogens.

In absence of an explicit regulation by international law, some scholars use the European Convention on Human Rights and Fundamental Liberties (ECHR) and the International Convention on Civil and Political Rights (ICCPR) as points of orientation. They argue that those rights that according to article 4 ICCPR and article 15 ECHR are protected from derogation even in cases of public emergency would represent the core of human rights (cf. Meron, 1986, p. 1, 9; Zehnder, p. 69). Other scholars put forward that it was the fact that certain human rights were the direct expression of the human dignity that would distinguish them from the rest and would make them a part of jus cogens (cf. e.g. Bernhardt, 1992, p. 192, 355f). A third line of argumentation points out that the most basic human rights were indicated by international criminal law. Those rights whose violation was categorized by international law as international crimes would form the centre of human rights. Arguably, by the codification of these rights in form of international criminal acts, the international community showed a special will for their protection which reflected the superior importance of these rights (cf. Jorgensen, 2003, p. 90; Dahm/Delbrück/Wolfrum, 2002, p. 716; Hobe, 2008, p. 180). As none of these approaches seems to be generally adopted it is not possible to present a comprehensive list of fundamental human rights. Consequently, the question which human rights can be considered fundamental and for that reason a part of jus cogens remains to a certain degree unanswered (cf. German Institute for Human Rights, 2009). It can however be seen as consensus that the prohibition of torture, slavery and genocide as well as the right to live are generally accepted as human rights of such fundamental importance that they are considered jus cogens (cf. Koenig, 2003, p. 67; Kadelbach, 1992, p. 69ff; Hobe, 2008, p. 180; Zehnder, 2003, p. 69; Browlie, 2008, p. 490).

2.3. Contextualization within the overall order of international law

The creation of human rights on the international level is considered one of the “most important accomplishments” (Zehnder,2003,p.61, own translation) achieved in the post World War II era of international law. At the same time it has to be seen as a major turning point in the history of international public law. The “classical order of international law” (Hobe,2008,p.37, own translation) was almost exclusively concerned with the regulation of the interaction of sovereign nation states. As states were the exclusive subjects of international law, the rights and duties of individual citizens were not seen as a matter of international law (cf.Alebeek,2008,p.301;Browlie,2008,p.485). Consequently, the protection of human rights was widely considered a matter to be dealt with in the domestic sphere and as such fell within the exclusive competence of the sovereign states. With only few existing international agreements of limited ambit, no comprehensive international legal standards for the protection of human rights existed (cf.Schilling,2004,p.3;Kimminich,1988,p.339)²¹.

The establishment of human rights treaties that were addressed directly at individuals and contained instruments that allowed their direct implementation²² brought about a profound change to this classical order. As a person’s human rights could then be directly inferred from the international treaties, individuals became “partial subjects of international law” (Hobe,2008,p.167, own translation). In addition to that, international human rights standards limited the traditional freedom of states and thereby constituted an important limit to national sovereignty.

Given this background, the conflict between head of state immunity, standing for the principle of sovereignty, and human rights, that will be in the focus of part three, has to be seen as conflict between the classical and a rather modern order of international law.

²¹The earliest example of a multinational regulation of human rights is the prohibition of the trade with slaves, included in the Final Act of the Congress of Vienna, 1815 (cf.Schilling,2004p.3). The protection of individuals in the context of war (humanitarian international law) and the protection of minorities by the Treaty of Versailles are other early expressions of international human rights agreements (cf.Herdegen,2006,p.317;Doehring,2004p.426).

²² See for examples the mechanisms of implementation in the European and American Convention on Human Rights and the African Charter on Human and People’s Rights.

3. The immunity of heads of state in the case of human rights violations

In part one and two of this thesis, the head of state immunity and the international human rights protection have been presented as two well established concepts of international law. On this basis now an analysis will be undertaken on how the conflict between those two concepts can be resolved.

3.1. The Jurisdiction²³ of international and domestic courts

Before the question can be assessed whether in cases of grave violations of human rights, the head of state is protected by immunity, one needs to clarify which courts have jurisdiction in such matters. As immunity has to be seen as an exception to a court's jurisdiction, this question logically precedes the question of immunity. In other words "if there is no jurisdiction, there is no reason to raise or consider the question of immunity" (ILC,2008a,p.22). In addition to that, the question of jurisdiction indicates where the question of immunity becomes in fact relevant and therefore indicates the court level that needs to be put in the focus of the subsequent analysis.

3.1.1. The jurisdiction of international criminal courts

According to their respective statute, international criminal courts were given far-reaching jurisdiction with regard to grave breaches of human rights codified as international crimes²⁴. That certainly makes them play a central role in the prosecution of international crimes. But as the immunity of head of states is explicitly excluded in their statutes²⁵ their jurisprudence is less important with regard to the question of this thesis²⁶.

²³ „Jurisdiction means the competence of or power of territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects“ (Special Rapporteur Sucharitkul, quoted in ILC,2008a,p.24).

²⁴ For example, article 6 Statute of the International Military Court laid down the jurisdiction of the court for crimes against peace, crimes against humanity and war crimes. Article 1 to 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia put down the jurisdiction of the court with regard to grave violations humanitarian international law. For the International Criminal Court, article 5 of the Rome Statute determines that the court has jurisdiction with respect to the crime of genocide, the crimes against humanity, war crime and the crime of aggression.

²⁵ Article 7 Statute of the International Military Tribunal determined the "official position of defendants, whether as Head of State or responsible in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment". The Statutes of preceding tribunals contain identical provisions (Art 6 International Military Tribunal for the Far East, article 7 of the International Criminal Tribunal for the Former Yugoslavia and article 6 II of the International Criminal Tribunal for Rwanda). Article 27 of the Rome Statute equally excludes the immunity of head of states by stating that "this Statute shall apply equally to all persons without any distinction based on

3.1.2. The jurisdiction of national courts

The territorial principle²⁷ and the protective principle²⁸ are two generally accepted rules providing for the jurisdiction of a domestic court over a foreign head of state. The principle of passive personality²⁹, however, seems to be rather contested. None of these principles will be further discussed here, because, due to the typical constellation under which a foreign head of state is accused of having committed grave breaches of human rights – neither do these violations typically occur on the territory of the forum state nor do they typically constitute a threat to the forum state’s security – neither of them seems to be of particular relevance to this thesis.

On the contrary the principle of universal jurisdiction is of special importance to cases of grave human rights violations by heads of state. According to the principle, certain offences, because of their particular character can be prosecuted by domestic courts worldwide (cf. Ambos, 2008, p. 53; Stein/Buttlar, 2009, p. 219). “Regardless of the locus delicti and the nationalities of the offender and of the victim” (ILC, 2008, p. 13) it derives jurisdiction from the fact that the violation of certain fundamental norms is “regarded as particularly offensive to

official capacity: In particular official capacity as a head of State or Government (..) shall in no case exempt a person from criminal responsibility under this Statute, nor shall it,(...) constitute a ground for reduction of sentence. The same article points out that “Immunities (..) which may be attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.

²⁶ In the arrest warrant case the ICJ has rejected to take into consideration the respective Charters of the courts quoted above as they did “enable to conclude that any such exception exists in customary international law in regard to national courts” (ICJ, Arrest Warrant Case, 2000, para. 58).

²⁷ According to the territorial principle, a state can prosecute offences (or alleged offences) that have been committed on its national territory (cf. Jonscher, 2007, p. 15). The territorial principle that can be seen as a “logical manifestation of a world order of independent states” (Shaw, 2003, p. 580) is widely accepted in international law (cf. Stein/Buttlar, 2009, p. 214).

²⁸ According to the protective principle, in the case of an act that has been committed abroad and by an alien person, the jurisdiction of domestic courts is justified if the committed acts are deemed to threaten the security of the forum state or deemed to undermine the vital functions of the state. The principle as such is widely accepted in related literature and established in numerous legal systems. It has also been applied in the British case of *Joyce v. Director of Public Prosecution*. But with regard to the review of human rights violations committed by heads of state, it seems to be only of limited importance. The principle is typically applied to cases related to immigration and different economic offences rather than to cases of human rights abuses (cf. Browlie, 2003, p. 302; Shaw, 2003, p. 592).

²⁹ According to the principle of passive personality that has been adopted in the *Cutting Case* in 1887 and was referred to in the *Lotus case* of 1927, the requirement of a necessary link would be fulfilled if an offence violated the rights of the forum state’s national. Even though it is said to have “found its niche in recently adopted counter-terrorism instruments” (ILC, 2008, p. 13) the principle is criticized as “a dubious ground upon which to base claims to jurisdiction” (Shaw, 2003, p. 590) and as such does certainly not form a sufficient basis to review the action of heads of state.

the international community as a whole” (Shaw,2003,p,593) and that those who committed them are considered “enemies of the entire humankind (*hostes humani generis*)” (Herdegen,2006,p.186, own translation). In such cases, the prosecution of the offender is a common concern of all states, meaning that the prosecuting state is taking action on behalf of the international community. Its jurisdiction is therefore not regarded as intervening with the domestic affairs of another state (cf.Ambos,2008,p.54). This principle which is well established with regard to certain acts, of which piracy on the international sea is certainly the most classical example (cf.ILC,2008,p.13;Ipsen,2004,p.664), is today taken as a basis for the prosecution of grave violations of central human rights. In default of a comprehensive written agreement on universal jurisdiction, the references made to the principle in various international agreements, as for example in the Geneva Red Cross Convention³⁰ or the UN Convention against torture³¹, the UN-Convention on the Prevention and Punishment of Crimes against Internationally Protected Person, including Diplomatic Agents or the UN-Convention for the Suppression of Unlawful Seizure of Aircraft, can be seen as proof of the validity of the concept in international law. Another indication in that sense is the fact that the principle has served as the basis for jurisdiction of national courts³². Another proof of its existence is the fact that it has been incorporated into certain national legal systems³³. The

³⁰ With regard to armed conflicts, the four Geneva “Red Cross” conventions contain provisions even constituting an obligation for states to prosecute offenders in cases of grave breaches, including torture or inhuman treatment, unlawful deportation or attacking civilian populations (cf.Art. 49 of the first Geneva Convention, Art. 50 of the second Geneva Convention and Article 146 of the Fourth Geneva Convention)

³¹ In the case of the United Nations Convention against Torture, the universal jurisdiction principle is not explicitly laid down, but can be inferred from the *aut dedere aut iudicare*-principle (cf. Burgers/Daneljus,1988,p.132). Article 5, paragraph 2 determines that a state has jurisdiction over offences of torture in cases where the offender is present on its territory and where it does not extradite him to a country which has jurisdiction because of the territorial or the nationality principle.

³² Most prominently it has been applied in the Eichmann Case, in which the District Court of Jerusalem pointed out that international law needed all courts of all states to give effect to its criminal interdictions and to prosecute such criminals (cf.Lippmann,1982,p.30). The US court of appeal adopted a similar approach when stating with regard to the extradition of Demjanjuk to Israel that “the universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. (...) Israel or any other nation (...) may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.” (US Court of Appeal, 6th circuit, quoted in: Stern,1993,p.8).

³³ For Germany, §1 VStGB determines that universal jurisdiction exists for all criminal acts included in the VStGB, Belgium law contains the principle of universal jurisdiction in Art. 7 of the Law on the punishment of severe violations of humanitarian law of 1999 and according to French law, municipal courts can base their jurisdiction on international conventions, including the Convention against Torture. In the United Kingdom Article 134 of the Criminal Justice Act allows jurisdiction over an official “whatever his nationality for committing torture in the UK or elsewhere”.

principle is also supported by non-binding documents and academic literature (cf. e.g. Werle,2003,p.70; ILC, Code of Crimes against Peace and Security of Mankind,1996³⁴).

On the contrary it seems questionable whether universal jurisdiction is applicable in the absence of the alleged perpetrator. For example, in the arrest warrant case Judge Guillaume put forward in his separate opinion that universal jurisdiction in abstentia was unknown to international law³⁵. On the contrary in a joint opinion his co-judges Higgins, Kooijmans and Burgenthal expressed the opinion that there were clear indications for the gradual development of such a principle (ICJ,Arrest Warrant,2000,Higgins,Kooijmans,Burgenthal). The Institut de Droit International seems to confirm the former view³⁶. So do the Princeton Principles on Universal Jurisdiction (cf.Princeton-Principles,2001,s2). In the academic literature some controversy can be detected. Whereas the opposing opinion puts forward that, only the presence of the accused would distinguish the forum state from the rest of the international community and would justify a special interest in the offender's prosecution (cf.Gärditz,2006,p.284;), proponents argue that introducing the presence of the accused head of state as a precondition for universal jurisdiction would contravene the overall character of the principle (cf.Bosch,2004,p.56).

The previous analysis revealed that, as immunity is excluded before international jurisdiction, the domestic courts are the relevant juridical level with regard to this question. Most importantly (though not exclusively) based on the principle of universal jurisdiction, they can – reserving the question of immunity - claim jurisdiction over a wide range of possible cases of alleged violations of human rights by (former) heads of states.

³⁴ The Draft Code of Crimes against Peace and Security of Mankind adopted in 1996 by the International Law Commission determines in Article 8 that each state shall take the measures necessary to establish its jurisdiction over the crimes laid down in this Draft, which include among other genocide (Article 17), crimes against humanity (Article 18) and war crimes (Article 20) (cf.ILC,Code of Crimes against Peace and Security of Mankind,1996)

³⁵ Judge Guillaume underlined that “By contrast, none of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question“ (ICJ, Arrest Warrant Case,2000,Guillaume,p.40f).

³⁶ In part 3b of its resolution on Universal Criminal Jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes it states that “the exercise of universal jurisdiction requires the presence of the alleged offender” (Institut de Droit International,2005,para.3b).

3.2. Exceptions form head of state immunity because of human rights violations

In the following part it will be analyzed how domestic courts have resolved the conflict between (former) head of state immunity and human rights. Instead of simply presenting the court practice case by case, the following paragraphs strive at excerpting the three most important lines of argumentation applied by courts when stripping heads of state of their immunity³⁷. These three central lines of argumentations will be discussed in the light of literature on this question.

3.2.1. Exception because of the private nature of human rights violations

As has been shown in the first part of this thesis, the immunity of former heads of state is restricted to official acts they carried out during their time in office. Courts and scholars use this reduction to immunity *ratione materiae* as a starting point to refuse them immunity for acts violating human rights. They argue that certain human rights violations must not be seen as sovereign acts or acts carried out in official capacity (cf. Alebeek, 2008, p. 222; Bosch, 2004, p. 88) because heads of state that violated those principles acted “*ultra vires*”, meaning that they transgressed their role and function as heads of state (cf. Horowitz, 1999, p. 523).

US courts adopted this approach in certain cases, the most important of which is *Hilao v. Estate of Ferdinand Marcos*. In this case the US Court of Appeals decided that the former head of state of the Philippines Marcos could not claim immunity with regard to acts of human rights violations that he was accused of, as his acts of torture, execution and disappearance were clearly acts outside of his authority or mandate as President (cf. US Court of Appeals, *Trajano v. Marcos*, 1992)³⁸. In the *Eichmann Case*, the Israely court brought forward a similar argument when concluding that “the very contention that he systematic extermination of masses of helpless human beings by a Government or regime could

³⁷ When analysing the court practice, special attention will be given to cases dealing specifically with the immunity of heads of state. Where possible decisions on state immunity will also be also taken into account.

³⁸ It is important to note that when assessing whether Marco’s acts were to be considered as private or as official, the US court did not make reference to an international standard determining the role and competences of heads of state, but to provisions of national Philippine law determining its mandate (cf. Appelbaum, 2007, p. 98). It is equally important to point out that this exception to immunity was based exclusively on national US American law, namely the Federal Tort Claims. For these reasons the case gives only weak indication of a general exception according to international law (cf. Appelbaum, 2007, p. 100).

constitute an act of state, appears to be an insult to reason and a mockery of law and justice” (Eichmann,1962,quoted in Alebeek,2008,p.244).

Even more important with regard to current international law, the exception presented here has also been intensely discussed in the House of Lords Judgements in the Pinochet case. In the first judgment the majority of the British judges argued that the former head of state Pinochet could not claim immunity for the severe human rights violations that he was accused of having committed during his time in office. For example Lord Nicholls argued that according to international law, torture was not considered a function of a head of state and would therefore not qualify as an official act covered by immunity *ratione materiae*. He explained his view by saying that even though international law acknowledged that the role of a head of state covered the violation of certain international or national norms, it would however not include committing acts of torture or taking hostages. In his own words, “acts of torture and hostage-taking, outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability” (Pinochet2,1998,Nicholls). His fellow judges Lord Hoffman and Lord Steyn adopted a similar view. The latter admitted that, in the absence of explicit international norms, the differentiation between *acta iure gestionis* and *acta iure imperii* was extremely difficult. He nevertheless concluded that the development of international law since the Second World War provided such a standard³⁹. The former head of state Augusto Pinochet was hence stripped of his immunity with regard to the human rights violations that he was accused of.

In the subsequent Pinochet judgement⁴⁰, the argumentation did not prevail⁴¹. Discussing the approach taken in the previous judgement Lord Goff for example comes to the conclusion that this view “receives no support from literature” and “appears never to have been advanced before” (Pinochet3,1999,Goff). He also pointed out that seeing torture as a non-official act would be contrary to the convention of torture itself. Lord Hope followed the same line of argumentation. He explained “it may be said that it is not one of the functions of a head of

³⁹ “Negatively, the development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'etat, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity [...] as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State” (Pinochet2,1998,Steyn).

⁴⁰ The first House of Lords judgement, was reversed because Lord Hoffmann was considered to be “disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity” (Pinochet2,1998,Browne-Wilkinson).

⁴¹ This does however not mean that this line of argumentation had been abandoned entirely. For example Lord Hutton pointed out that although the alleged acts were carried out by General Pinochet “under colour of his position as head of state [...] they cannot be regarded as functions of a head of state” (Pinochet3,1999, Hutton).

state to commit acts which are criminal according to the laws and constitutions of his own country or which customary international law regards as criminal. But I consider that this approach is unsound in principle” (Pinochet3,1999,Hope). He nevertheless added that there could be an exception to this rule. Taking up an example that had been given by Lord Steyn in the first House of Lords’ judgment of a head of state killing his gardener in what the latter had referred to as a fit of rage, he explained that acts clearly done for the respective head of state’s “pleasure or benefit” would not be protected by immunity *ratione materiae* (Pinochet3,1999,Hope). As this was not true for the alleged crimes in this case, no exception from immunity could be based on this argumentation. For Lord Hutton the fact that “the acts of torture that Senator Pinochet is alleged to have committed were not carried out in his private capacity for his personal gratification” appears to be evident (Pinochet3,1999,Hutton). Lord Millett supported the arguments. In his opinion, Pinochet “employed torture as an instrument of state policy” (Pinochet 3,1999,Millet). To support his view he also pointed at the fact that Pinochet had used the structure of the Chilean military to carry out his crimes.

The two different judgments in the Pinochet case reveal to which degree this exception from immunity is contested. When looking at the academic literature and subsequent court decisions, one has to say that the exception adopted in the first Pinochet judgement⁴², is confronted with considerable opposition.

A first line of criticism makes reference to the constellations in which grave human rights violations typically occur. Taking up the argument by Lord Millett in the final Pinochet judgement, Zehnder for example points at the fact that grave human rights violations like systemic torture, genocide or crimes against humanity were often committed using the organizational capacities of the state. Instead of carrying out the human rights violations themselves, heads of state generally delegate the commitment of such acts to lower ranked officials. Accordingly, “it can hardly be contested that [...] international crimes are in principle committed in office or that their commitment is only possible because of the use of the state capacity” (Zehnder,2003,p.155, own translation). For that reason it would be problematic to see those acts as the “private amusement” of the heads of state. A similar

⁴² The view presented in the first Pinochet decisions of the House of Lords can be supported on the basis of Article 13 II of the 2001 resolution of the Institut de droit international on the Immunities from Jurisdiction and Execution of Heads of State and Government in International Law. When stating that a former head of state can not claim immunity for acts he “performed exclusively to satisfy a personal interest”, the resolution seems to suggest, that such acts should not be seen as official acts covered by immunity *ratione materiae* (Institut de Droit International,2001).

argument is presented by *Bosch*, *Dominicé* or *Alebeek* (cf. *Bosch*,2004,p.90;*Dominicé*,1999,p.305;*Alebeek*,2008,p.146). The ILC report on Immunity of State officials also indicates that in most cases international crimes are committed as a part of state policy (cf.*ILC*,2008,p.126). Judge Van de Wyngaert, emphatically supports this view in her dissenting opinion in the arrest warrant case, when saying that “some crimes under international law e.g. certain acts of genocide and of aggression can, for practical purposes, only be committed with the means and mechanisms of a State and as part of State policy. They cannot [...] be anything other than ‘official’ acts” (*ICJ*,*Arrest Warrant*,2000,*JudgeWyngaert*,para.36).

Another line of argumentation bases its criticism on provisions from documents of international law. Taking up the argument expressed by Lord Goff, *Bosch* for example points out that according to the definition of torture in Article 1 I CAT, an act of torture is characterized by the fact that it is committed in official capacity (cf.*Bosch*,2004,p.90). At this point one can add, that the participation of a state has originally also been a precondition for an act to be classified as crime against humanity (cf.*Zehnder*,2003I,p.155).

The draft articles of the ILC on the Responsibility of States for internationally Wrongful Acts can provide further orientation, when assessing the private or official character of a head's of state action (cf.*Appelbaum*,2007,p.111). According to the ILC, “there appears to be strong reason for aligning the immunity regime with the rules on attribution of conduct for purposes of State responsibility” (*ILC*,2008,p.102). In fact the named principles do not contain a direct definition of what is an official act. Art 7 dealing with conduct ultra vires, does however suggest that even conduct with which an official “exceeds its authority or contravenes instructions” was to be seen as an act of the state (*ILC*,2001,Art.7)⁴³. The commission's commentary on article 4 of the principles provides further indication in this matter. It states that neither a private interest nor the abusive character of head of state would deprive a conduct of its official character. It further says that if an official acted in “apparent official capacity or under the colour of the authority” of the state the conduct can be considered the action of the state (commentary to Article 4, quoted in *ILC*,2008,p.103). In the light of these provisions, *Appelbaum* seems right to conclude that, the principles used as a “source of inspiration” (*ILC*,2008,p.102), suggest, that even grave human rights violations should be

⁴³ Article 7, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, on the “Excess of authority or contravention of instructions”: “The conduct of an organ of a State or of a person or entity empowered to exercise elements of the government authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes onstructions (cf.*ILC*,2001,Art.7).

considered official acts, that are hence covered by immunity *ratione materiae* (cf.Appelbaum,2007,p.111).

3.2.2. Implied waiver exception

The analysis of national and international law clearly reveals that states can waive the immunity of their current and former heads of state⁴⁴ (cf. ILC,2008,p.161f;Alebeek,2008,p.181;Zehnder,2002,p.55). According to national and international law, states can also implicitly waive their immunity (cf.Ipsen,1999,p.337; Schumann/Habscheid,1968,p.28). According to the Institut de droit international, “waiver may be explicit or implied, provided they are certain” Institut de Droit International,2001,art.7). In the following it will be discussed whether the ratification of human rights treaties or the mere violation of *jus cogens* can be seen as the expressions of a state’s “clear intent to waive immunity” (ILC,2008,p.167) and can therefore be considered an implied waiver.

3.2.2.1. The ratification of human rights treaties as implied waiver

Reviewing state practice and related literature a line of argumentation can be identified, according to which the ratification of an international human rights treaty should be seen as an implied waiver of state immunity. According to this approach, states would via the ratification of a human rights treaty express their will to accept the protection of the rights included in the respective treaty via foreign domestic courts. They would therefore implicitly waive their immunity and accept being sanctioned for actions violating the provision of the treaty (cf.e.g.Jacobson,1997;Bosch,2004,p.92). Supporters of this approach refer to the fact that human rights treaties include provisions that oblige states to respect and effectively

⁴⁴ States can waive their or their head’s of state immunity when expressing explicitly that they accept jurisdiction in cases in which they would otherwise have been granted immunity. The ratification of an international treaty including such a provision, the declaration of waiver before the court or the extradition of a (former) head of state can be seen as examples of those explicit waivers (cf.Tangermann,2002,p.209). In the case of Marcos, the US court stated for example that the Philippines had, via a diplomatic note, waived the immunity of their former head of state (cf.Callan,1990,p.122;ILC,2008,p.163).

It is largely accepted that it is the expressed will of the state and not of the head of state himself that is significant, because, as it has been shown in part one of the thesis, head of state immunity is seen an expression of the immunity of sovereign states. In other words, as the head of state is ultimately excluded from jurisdiction to protect the state he represents or he once represented, it is the state that can waive this right for protection (cf. ICJ, Arrest Warrant Case,2000,para.61; Alebeek,2008,p.181f).

protect the rights contained in the respective treaty⁴⁵. As this obligation clearly contradicts the principle of head of state immunity, its ratification had to be understood as an implied waiver of state immunity (cf. Tangermann, 2002, p. 216f).

This approach has in several cases been the subject of controversial discussions before different national courts. In the case *Van Dardel v. USSR* the court has concluded that the ratification of the VCLT and the Convention on the Prevention of Crimes against internationally protected persons, including diplomatic agents, can be seen as an implied waiver in the sense of § 1605 FSIA (cf. *Van Dardel v. USSR*, in: Dickens, 2004, p. 3048; Bosch, 2004, p. 91).

For the Convention on the Punishment of the Crime of Genocide this interpretation was rejected. In the case *Cour de Cassation*, a decision related to the indictment of Ariel Sharon. The court opposed the claimants' view, that Art IV of the Convention on the Punishment of the Crime of Genocide could be seen as an implied waiver of immunity⁴⁶. For the court it was decisive that the convention specified that "persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties" (UN Convention on Genocide, 1948, Art. 6). The court held that it could be derived from this mechanism for sanctioning contraventions explicitly laid down in the convention, that the convention would not want to implicitly establish the jurisdiction of domestic courts (cf. Cassese, 2003, p. 439).

In the final judgment on the Pinochet case before the British House of Lords, it was discussed if Chile's ratification of the United Nations Convention against Torture (CAT) could be considered an implied waiver. While several of the Lords included this argument in their reflections, Lord Saville seemed to be the only one who wanted to strip Pinochet of his immunity on this basis. Making reference to Part 1, Article 1 of the CAT, according to which torture is an act that "is 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", he stated that „each state party has agreed that the other state parties can exercise jurisdiction over alleged official

⁴⁵ One example of such a provision is Article 2 (3) (a) ICCPR according to which "each state party to the present covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity" (ICCPR, 1976, Art. 2).

⁴⁶ Article IV of the convention states that "persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

torturers [...] and thus [...] can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture”. He therefore concluded that “the states who have become parties have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty” (Pinochet3,1999,Saville).

These attempts to infer a waiver from human rights treatments have been emphatically rejected by other courts. Making reference to the decision of *Amerada Hess*, in which the US Supreme Court held that “a foreign state can[not] waive its immunity [...] by signing an international agreement that contains no mention of a waiver of immunity” (Supreme Court,*Amerada Hess*,cited in:ILC,2008,p.169) the exception has been rejected in the majority of cases before the US American courts (cf.Reimann,1995,p.408).

Brought up in the final court decision on the Pinochet case by Lord Saville, the implied waiver approach was opposed by the majority of judges. Even though Lord Hope agreed that the provisions of the CAT were binding for heads of state he argued that “it would be wrong to regard the Torture Convention as having by necessary implication removed the immunity *ratione materiae* from former heads of states in regard to every act of torture of any kind which might be alleged against him” (Pinochet3,1999,Hope). To justify his opinion, he adds that “the risk to which former heads of state would be exposed on leaving office [...] would have been so obvious to governments that it is hard to believe that they would ever agreed to this”. His colleague, Lord Goff, rejects the implied waiver approach in an even more explicit and general way. According to him, international law establishes very high requirements for an implied waiver, requirements, which the convention would clearly fail to meet. He furthermore pointed out that looking at the process leading to the adoption of the convention, the *travaux préparatoires*, no indication could be found that the CAT would restrict the immunity of the states parties. He concluded his statement by saying that the relatively high number of 116 states having ratified the Convention would “reinforce the strong impression that none of them appreciated that, by signing the Convention, each of them would silently agree to the exclusion of state immunity *ratione materiae*” (Pinochet3,1999,Goff).

Even though the other judges did not share the harsh critique brought forward by Lord Hope and especially by Lord Goff, the implied waiver was most obviously not considered a sufficient basis for stripping Pinochet of his immunity, either.

The “general reluctance to accept an implied waiver based in the acceptance of an agreement” (ILC,2008,p.169) that can be deduced from the judgements cited above is confirmed by the

analysis of academic literature. Most importantly, it is contested that the ratification of a human rights treaty can be seen as the clear expression of a state's will to waive its immunity, which is according the standards of international law seen as the condition for an implied waiver (cf.Heß,1999,p.275).

To explain this opposition, *Appelbaum* for example, analyzes the claim made by supporters of the implied waiver approach, that Article 56 UN-Charter would include an implied waiver, by providing that, "all Members pledge themselves to take joint and separate action [...] for the achievement of the purposes set forth in Article 55". He argues that, while establishing a certain obligation for the Member States, Article 56 would not determine the way in which they had to fulfil this obligation. Consequently the Article could not imply an automatic waiver of immunity (cf.Appelbau,2007,p.143). Opponents also hold, that it was not the primary objective of human rights treaties to allow procedures against states or heads of state and that therefore the ratification of a treaty would not sufficiently indicate a state's will to allow the review by other states' courts (cf.Bosch,2004,p.92). The fact that certain treaties⁴⁷ establish special mechanisms and institutions to ensure the respect of the rights contained in the respective treaty and the existence of treaties that contain specific provisions by which states that are parties to this treaty explicitly waive their immunity is also used as an argument against the implied waiver approach (cf.Garnett,1997,p.109;Appelbaum,2007,p.151).

3.2.2.2. *The violation of jus cogens as implied waiver*

The violation of norms of international law that are considered as jus cogens is also suggested to be an implied waiver (cf.Bröhmer,1997,p.190;Reichmann,1993,p.980f.;Belsky et al., 1989,p.415;Bosch,2004,p.190). Horowitz argues for example that a jus cogens violation strips a sovereign of his or her immunity because a sovereign constructively waives the privilege of immunity by committing such a violation (cf.Horowitz,1999,p.522). Supporters of this approach regularly make reference to the development of international law after the second World War. With reference especially to the Nuremberg trials, they state that the standards of today's international law would incontrovertibly determine that heads of state could not commit atrocities considered international crimes without being internationally prosecuted. As these provisions would be clear to every head of state, they, when committing international crimes, could not help but knowing that they might one day be prosecuted for

⁴⁷ Example cited are Article 28 of the International Covenant on Civil and Political Rights or Article. 17 of the Convention Against Torture.

their actions. Consequently, by committing crimes, they would implicitly waive their immunity. As Horowitz puts it with regard to the former Chilean head of state: “Pinochet waived his immunity by committing violent acts of torture because he was aware of individual criminal responsibility for jus cogens violations [...]” (Horowitz,1999,p.523).

The implied waiver exception in the case of jus cogens violations was also suggested by the amicus curiae in the case *Hugo Princz v. Federal Republic of Germany* before the US Court of Appeals for the District of Columbia, who argued that “a foreign state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign” (US Court of Appeal,Princz,1993,Wald). In her dissenting opinion in the same judgement, Judge Wald argued that the Nuremberg Tribunal and the International War Crimes Tribunal for the former Yugoslavia had “permanently eroded any notion that the mantle of sovereign immunity could serve to cloak an act that constitutes a crime against humanity” (US Court of Appeal,Princz,1993,Wald). Consequently, she argued that the implied waiver exception to state immunity was a necessity of international law.

The other judges rejected the argumentation of Judge Wald. They did not only indicate that the argumentation could hardly be based on any previous judgement, they particularly pointed out that an implied waiver depended “upon the foreign government having at some point indicated its amenability to suit” (US Court of Appeal,Princz,1993,Wald). The violation of jus cogens alone could not be seen as such an indication. Consequently the court held that Germany had shown no intentionality to waive its immunity (cf.Bergen,1999,p.175;Garnett,1999,p.111).

In the case *Prefecture of Voiotia v. Federal Republic of Germany*, the Greek court actually used this argument to deprive Germany of its immunity (cf.Bantekas,1998,p.766).

In the final judgement against Augusto Pinochet, Lord Hope appeared to consider the question whether the violation of the prohibition of torture, which possesses the character of a jus cogens norm, would constitute an implied waiver, though he in the end apparently rejected this approach (cf.Pinochet3,1999,Hope).

The opposition against the implied waiver exception in the case of jus cogens violations is confirmed by various scholars. They reject the approach, most importantly because the head of state by violating jus cogens had not expressed any intentionality to waive his immunity. (cf.Bröhmer,997,p.191;Alebeek,2008,p.329;Bosch,2004,p.94;Reimann,1995,p.409).

3.2.3. Exception because of the special status of human rights as jus cogens

Several court judgements and the literature dealing with the question of head of state immunity suggested to derive an exception to head of state immunity the special status of certain human rights as jus cogens⁴⁸. Supporters of this approach argue that whereas state immunity belonged to the norms of ordinary customary international law, the so-called jus dispositivum⁴⁹, certain human rights possessed a special status as law from which no derogation is permissible. Supporters of this approach speak of a hierarchy of norms that places jus cogens norms in a superior position to all other norms of international law (cf. Horowitz, 1999, p. 510). *Reimann*, for example, concludes that “since core human rights are part of the former [jus cogens], while sovereign immunity is only part of the latter [ordinary customary law], human rights trump the claim to immunity” (Reimann, 1995, p. 420).

This exception is popular but certainly not unquestioned with the related academic literature. There is particularly strong criticism vis-à-vis the idea of a real hierarchy of norms in international law. Making reference to the ILC judgement in the case *SS Lotus*, scholars argue that different to national legal systems, international law is of an horizontal and not a vertical or hierarchical structure, in which all norms derive from an equal act of creation by sovereign states (cf. Appelbaum, 2007, p. 256f; Ipsen, 2004, p. 189).

Another, less frequent argument against the human rights exception makes reference to the fact that head of state immunity as the direct expression of sovereign equality of states could be seen as a fundamental principle of international law that would also possess jus cogens character (cf. Appelbaum, 2007, p. 261; Bosch, 2004, p. 133). This argument seems little convincing. As has been stated in part 3.1 of this thesis, international law determines that states can waive their immunity, which clearly expresses its nature as a norm of jus dispositivum and puts it in contrast to jus cogens, whose characteristic is the fact that it must not be deviated from. Moreover, this argument does not seem to be supported by a large number of scholars (cf. Appelbaum, 2007, p. 261; Bosch, 2004, p. 133).

The analysis reveals that it is rather the scope of the coercive power of jus cogens that is at the heart of the conflict. The interpretation of the provisions of the Vienna Convention on the Law of treaties - the central point of reference for the existence of jus cogens - is at the centre of this controversy. Critics of the hierarchy argument cite Article 53 Sentence 1 that determines that “a treaty is void if, at the time of its conclusion, it conflicts with a preemptory

⁴⁸ For details on jus cogens and on the question which human rights can be considered human rights see part two of this thesis.

⁴⁹ For a discussion of the legal character of state immunity and head of state immunity see part one of this thesis.

norm of general international law”. Referring to this provision, opponents argue that the peremptory effect of jus cogens was restricted only to contradicting treaties and would, however, not introduce an overall hierarchy among the norms of international law (cf.Bröhmer,1997,p.74ff;Ipsen,2004,p.190). Therefore, the mere character of human rights as jus cogens could not be seen as the origin of an human rights exception to state immunity (cf.Appelbaum,2007,p.271).

Supporters of the hierarchy argument make reference to article 53 sentence 2 which defines jus cogens “as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”. Following this definition, they argue that the peremptory effect of jus cogens should be interpreted in a broad way, meaning that it is not restricted to contradicting treaties but includes all forms of public action (cf. Bosch,2004,p.107;UNICTY,Furunzija,1998). *Real* supports this interpretation when saying that the restrictive interpretation of Article 53 is absurd, as this would mean that the same action would be considered impermissible if adopted in form of a treaty and as permissible if adopted in a different form (cf.Real,2004,p.199). Reviewing the literature, one can detect a tendency to accept this view (cf.Real,2004,p.213;Reimann,1995,p.420;Bosch,2004,p.107; Ipsen,2004,p.190).

Powerful criticism vis-à-vis the jus cogens exception is also based on the opinion that no real conflict exists between the principle of immunity and the prohibitions of jus cogens norms. Contrary to the comments of the supporters of the exception, it seems in fact not “self-evident that a substantive rule of international law criminalizing certain conduct is incompatible with a rule preventing [...] prosecution for that conduct in a foreign criminal jurisdiction” (ILC,2008,p.128f). *Fox* argued for example “state immunity is a procedural rule going to the jurisdiction of national courts. It does not go the substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement”. She therefore concluded, “there is no substantive content in the procedural plea of State immunity upon which a jus cogens mandate can bite” (Fox, 2002,p.525). Referring to the same point Alebeek argues that a conflict “requires sliding from the jus cogens nature of the prohibition of certain conduct to the nature of the rule allowing or requiring enforcement of that prohibition on foreign national courts” (Alebeek,2008,p.220). According to her, a real conflict would only exist, if the jus cogens norm generated a procedural rule concerning the prosecution of jus cogens violations. This, she denies. (cf.Alebeek,2008,p.319). This has also been denied by Lord Hoffmann in the Jones case

(House of Lords, Jones, 2006, Hoffmann)⁵⁰. Supporters of the exception have insisted that universal condemnation of violations of jus cogens could hardly be “reconciled with the immunity for those crimes (cf. ILC, 2008, p. 129).

The various issues surrounding a possible jus cogens exceptions have been discussed in several court decisions. In general, the courts have been reluctant to actually adopt an exception to immunity on this basis. Dealing with the state immunity and not the immunity of a head of state, in the case *Siderman de Blake v Republic of Argentina*, the claimants argued that “when a state violated jus cogens, the cloak of immunity provided by international law falls away, leaving the state amenable to suit” (US Court of Appeals, Siderman, 1992). But at the end of the day the court rejected to apply the exception with the argument that it was bound by the strict standards established by the Supreme Court in the decision *Ameradea Hess*. It nevertheless stated that “as a matter of international law the Sidermans’ argument carries much force” (US Court of Appeals, Siderman, 1992). Observers have interpreted the court’s remarks as a clear acceptance of an exception based on the jus cogens character of human rights (cf. Garnett, 1997, p. 110). The hierarchy argument has also been brought forward in the case *Al-Adsani v. United Kingdom* but has been rejected by the European Court of Human Rights (cf. ECHR, Al-Adsani, 2001, p. 6)⁵¹. In 2004 the Italian Supreme Court had used the same argument to actually deprive the Federal Republic of Germany of its immunity with regard to acts of deportation and forced labour (cf. Hague Justice Portal, 2010)⁵².

In the final Pinochet-judgement, the fact that Pinochet had allegedly violated jus cogens was intensely discussed. Several of the judges argued that acts of torture were a breach of the jus cogens principles⁵³. However, none of the Lords seemed to have perceived this fact as basis

⁵⁰ Lord Hoffmann pointed out that “the jus cogens is the prohibition on torture. But the United Kingdom, in according state immunity [...] is not proposing to torture anyone. [...]. To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles of perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged” (House of Lords, Jones, 2006, Hoffmann, para. 44, 45).

⁵¹ In his judgement the majority of the judges held that under international law no exception to immunity existed. They emphasized that the 2004 UN-Convention on Jurisdictional Immunities of States and their Property does not contain a human rights exception and added that the state practice would not support such an exception either. However eight of the seventeen judges dissented and argued in favour of a jus cogens exception (cf. e.g. dissenting opinion of Judge Rozakis and Caflisch).

⁵² In 2008 Germany has filed an application instituting proceedings against Italy before the ICJ, for the disregard of its immunity by Italy. The case is pending (cf. ICJ, 2008).

⁵³ For example Lord Millet pointed out that “The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have

for stripping Pinochet of his immunity. Lord Hope is the one who rejected this approach the most clearly when stating that “even in the field of high crimes as have achieved the status of *jus cogens* under customary international law there is as yet no general agreement that they are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts” (Pinochet3,1999,Hope).

Looking at this firm opposition it seems important to take into consideration that different to the exception from immunity that has been presented in section 3.2.1. of the thesis, the hierarchy argument could in principle strip former and acting heads of state of their immunity. No logic argument can be found for why immunity *ratione personae* could not be overridden, if one in principle accepts the hierarchy argument. But little surprising, courts have been even more reluctant to adopt this approach to justify an exception to an acting head of state immunity. One of the rare occasions the exception was proposed in case around a high official, enjoying immunity *personae* was the dissenting opinion of judge Al-Khasawneh in the ICJ Arrest Warrant judgement, in which he criticized the decision by the majority of his fellow judges and argued that “the effective combating of grave crimes has arguably assumed a *jus cogens* character [...]. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail” (ICJ, Arrest Warrant,2000,Al-Khasawneh,p.99).

A similar argumentation was brought forward in the case on accusation of terrorism against the Libyan head of state Muammar al-Ghaddafi before the Parisian Cour d’appel. The hierarchy exception brought forward by the claimants, was however unmistakably rejected by the court (Cour d’Appel de Paris, quoted in: Appelbaum,2007,p.218).

provided immunity which is co-extensive with the obligation it seeks to impose” (Pinochet3, 1999,Millet).

Conclusion

In this thesis, it has been shown that with head of state immunity and international human rights two contradicting normative concepts exist in today's international law. As a norm of customary international law, head of state immunity has undergone some changes, but its general existence remains, with good reasons, unquestioned. At the same time, the internationalization of human rights protection can justifiably be considered the major achievement of the development of international law in the 20th century. With these two elements, each one standing for a different conception of international law, international law contains two opposing legal norms whose conflict is revealed with the utmost clarity when (former) heads of state's are accused of having gravely violated fundamental human rights.

It is the opinion of the author that international law has mostly failed to resolve the conflict between these two norms in a convincing manner.

The implied waiver exception has to be rejected. Neither the ratification of a human rights treaty nor the breach of jus cogens represent an action that would express a state's intention to waive its immunity with the clarity that is required by the standards of International Law. Furthermore the implied waiver approach has to be opposed for political reasons. Because one has to fear that the interpretation of such treaties as implied waiver could in the future reduce the willingness of states to join such treaties.

The approach taken in the first House of Lord's judgement in the Pinochet case, to base a human rights exception on the private nature of the alleged human rights violations is not pertinent, either. The analysis of relevant provisions of international law suggest otherwise. So does the fact that according to their definitions acts of torture and (originally) also crimes against humanity contained the involvement of states as a necessary precondition. The fact that many cases of grave human rights violations were committed in an official capacity, point in the same direction. Those violations were not acts of "heads of states killing the gardener in a fit of rage" and therefore not acts of private amusement but instruments of state policy carried out with the help of the state apparatus.

Form the author's point of view it is the jus cogens character of certain human rights that can best serve as the basis for an exception to immunity in cases of grave human rights protection. Despite the sound criticism that no conflict stricto sensu exists between immunity and human rights of a jus cogens character, the special character of the fundamental human rights should

be taken as the basis for an exception to head's of state immunity in the case of severe human rights violations. It is also because of political considerations, that this approach is preferable. Differently to the two other exceptions discussed above, the general adoption of the jus cogens exception could send to the international community a clear sign of commitment to an order of international law that considers the protection of the most basic rights of all human beings to be a common responsibility of the highest priority.

As the analysis above revealed it is currently difficult to detect a general state practice that would provide for such an exception from immunity. It therefore is the opinion of the author that it is the task of the states to change the general practice in favour of human rights protection. With the principle of universal jurisdiction and the immunity exception based on the superior character of jus cogens, there exist two powerful approaches that could turn domestic courts into even more important forums for human rights protection.

The author's support for the exception should not be misinterpreted as support for an inconsiderate surrender of head of state immunity. This thesis has pointed out that head of state immunity is a central element of international law that fulfils an important function for international relations. But in the case of the worst and most large-scale violations of the most basic rights of every human being, codified as international crimes, the moral obligation of the international community trump those considerations.

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